TITLE I

~~PROPOSED~~ BANKRUPTCY RULES ~~AND OFFICIAL FORMS UNDER CHAPTERS I TO VII OF THE BANKRUPTCY ACT~~

Rule 1. Scope of Bankruptcy Rules and Forms; Short Title

These rules and forms govern the procedure ~~in bankruptcy cases, including related proceedings~~, in courts of bankruptcy under Chapters I–VII of the Bankruptcy Act.

in this Title I

in bankruptcy cases

These rules may be known and cited as the Bankruptcy Rules. These forms may be known and cited as the Official Bankruptcy Forms.

ADVISORY COMMITTEE'S NOTE

A "bankruptcy case," as defined in Rule 101, is one wherein a petition has been filed by or against a person seeking his adjudication as a bankrupt. The case includes all of the proceedings and matters which arise in connection with the case and of which the court of bankruptcy is given jurisdiction by ~~the~~ Chapters I–VII of the Bankruptcy Act. These rules and forms ~~thus~~ do not apply to a case initiated or ordered to proceed under any of the debtor-relief chapters ~~(VIII–XIII). Nor do these rules~~ prescribe except incidentally the procedure for actions or "plenary proceedings" brought in state courts or federal district courts to determine controversies that arise in connection with a bankruptcy case.

in this Title I

or ordered to proceed

of the Act. The rules and forms in Title VII govern the procedure in Chapter XIII cases, and Titles II–VI are reserved for cases that are commenced or proceed under Chapters VIII–XII of the Act. These rules do not

"Courts of bankruptcy" are defined in § 1(10) of the Bankruptcy Act, 11 U.S.C. § 1(10), to "include the United States district courts and the district courts of the Territories and possessions to which this Act is or may hereafter be applicable." (References to the Bankruptcy Act hereinafter will be to the Act and will omit citations to Title 11 of the United States Code.) The courts of bankruptcy clearly include the district courts of Guam and the Virgin Islands. 1 Collier, *Bankruptcy* ¶ 1.10, at 71–72 n.22 (14th ed.rev. 1968), citing relevant statutory provisions. (Hereinafter citations to the Collier

treatise will omit the title and reference to the edition but will include the date of the revision of the cited material.) It is problematical whether the District Court for the District of the Canal Zone is a bankruptcy court, but it appears that this court has not undertaken to act as a court of bankruptcy. 1 Collier, *supra* at 72.

PART I. PETITION AND PROCEEDINGS RELATING THERETO AND TO ADJUDICATION

Rule 101. Commencement of Bankruptcy Case

A bankruptcy case is commenced by filing a petition with the court by or against a person for the purpose of obtaining his adjudication as a bankrupt.

ADVISORY COMMITTEE'S NOTE

A proceeding initiated by a petition for an adjudication under the Bankruptcy Act is designated a "bankruptcy case" for the purpose of these rules. The term embraces all the controversies determinable by the court of bankruptcy and all the matters of administration arising during the pendency of the case. This usage of the word "case" conforms to that employed in many provisions of the Bankruptcy Act (hereinafter referred to as the Act). See, *e.g.*, §§ 22, 32, 39b, 40c, 42, and 59d. The word "proceeding" as used in these rules generally refers to a litigated matter arising within a case during the course of administration of an estate. See particularly Rule 703. The rule assumes the continuing applicability of the definition of "petition" in § 1(24) of the Act, but as used in these rules, the word refers to the document commencing a bankruptcy case. The place of filing a petition is more fully particularized in Rule 509.

Rule 102. Reference of Cases; Withdrawal of Reference and Assignment

(a) ~~Original~~ *Reference.* Upon the filing of a petition the clerk shall refer the case forth-

with to a referee or, if a local rule so provides, to more than one referee concurrently. Thereafter all proceedings in the case shall be before the referee except as otherwise provided by subdivision (b) of this rule, by Rules 115(b) and 920, by § 2a(15) of the Act when a complaint seeks an injunction to restrain a court, by § 43c of the Act when the office of the referee is vacant, and by the provisions in the Act and the rules in Part VIII governing appeals from judgments of the referee.

(b) Withdrawal of Reference and Assignment. The district judge may, at any time, for the convenience of parties or other cause, withdraw a case in whole or in part from a referee and either act himself or assign the case or part thereof to another referee in the district.

ADVISORY COMMITTEE'S NOTE

Subdivision (a). The first sentence of subdivision (a) of this rule is derived from § 22a of the Act but deletes the clause authorizing the judge or judges to modify the provision for automatic reference. The practice, which has become established in some districts under § 22a of the Act, of referring cases concurrently to two or more referees of the court is recognized as proper by this rule.

The second sentence of subdivision (a) is adapted from General Order 12(1). A district judge may act in a bankruptcy case only when he withdraws a case from the referee pursuant to subdivision (b); when the office of the referee becomes vacant as provided in § 43c of the Act; when jury trial before a judge is demanded pursuant to Rule 115 (b); when the judge hears and determines issues under Rule 920 upon a certification that contempt has

been committed; when a complaint seeks injunctive relief against another court, which may be granted under § 2a(15) of the Act only by the judge, and when a judgment of the referee is being reviewed on appeal pursuant to §§ 2a(10) and 39c of the Act. The rules in Part VIII govern the procedure on review by the district judge of judgments of the referee. Sections 24a and b of the Act and the Federal Rules of Appellate Procedure govern the procedure on appeals to the courts of appeals, and § 24c of the Act and the Rules of the Supreme Court of the United States apply to review of judgments by that Court in bankruptcy cases. As [illegible] in the Note to Rule 701, these rules do not govern [illegible] in the district courts of the United States or in the state courts.

Subdivision (b) consolidates the provisions for transfer of a case from one referee to another in § 22b of the Act and for withdrawal of a reference in § 43c of the Act. The withdrawal and reassignment may be on motion or on the court's own initiative. Cause for withdrawal of a reference includes the statutory grounds specified in § 43c, *viz.*, temporary absence or disqualification of the referee and the need for expediting the business of the court. As noted above, § 43c continues to govern the situations in which a referee's [illegible] Subdivision (b) [illegible] [illegible] *Press Printers & Publishers, Inc.*, 12 F.2d 660, 661-65 (3d Cir. 1926), cert. denied, 276 U.S. 633 (1928). If the reason for assignment or withdrawal ceases to be operative, the case or proceeding may be remanded to the same referee. In districts having more than one judge the authority conferred by this rule ~~will~~ should be exercised according to the rules and orders of the court as provided by 28 U.S.C. § 137.

Subdivision (c) governs only the assignment of a case or proceeding to a referee within the territorial jurisdiction of the court. *Cf.* [illegible] & *Construction Co.*, 117 F. [illegible] (S.D.N.Y. [illegible]). The transfer of a case [illegible]

Rule 116 and the transfer of an adversary proceeding to another district is governed by Rule 782. Section 43c of the Act governs the assignment of a referee from without the district.

Rule 103. Voluntary Petition

A voluntary petition shall conform substantially to Official Form No. 1. ~~It~~ shall be filed ~~in triplicate~~, unless ~~additional~~ copies ~~are~~ is required by local rule.

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ADVISORY COMMITTEE'S NOTE

Official Form No. 1 (Petition for Voluntary Bankruptcy) has been simplified and shortened but retains the essential features of the official form for a debtor's petition promulgated under former § 30 of the Act. Although no copy of a voluntary petition is required to be served on any adverse party, the rule continues the requirement of § 59c of the Act that the petition be filed in triplicate.

Only the original need be signed and verified, but the copies must be conformed to the original. See Rule 911(c). The petition must be filed with the clerk as provided in Rule 509(a). As provided in Rules 401 and 601, the filing of the petition acts as a stay of certain acts and proceedings against the bankrupt and his property.

Rule 104. Involuntary Petitions

(a) Form of Petition; Number to be Filed. An involuntary petition shall conform substantially to Official Form No. 9. ~~It~~ shall be filed ~~in triplicate~~, unless additional copies are required by local rule.

An original and 2 copies of the petition

(b) Petition Against Person Who May Become Bankrupt by Act of Bankruptcy. A creditor may not file or join in a petition alleging the commission of an act of bankruptcy other than the sixth act, if he consented to participated in, or acquiesced in the commission of the act alleged. Notwithstanding the foregoing if a creditor, without in-

ducing it, participated in any general assignment, receivership, or other mode of adjustment or settlement of the affairs of the debtor and did not consent in writing thereto, or if he did so consent but without knowledge of facts which would constitute commission of the first, second, or third act of bankruptcy or which would be a bar to the discharge of the debtor in bankruptcy, he may nevertheless act as a petitioning creditor and may allege any act of bankruptcy including such assignment or receivership.

(c) Particularity of Allegations. The facts constituting an act of bankruptcy shall be alleged with sufficient particularity to identify the transaction or occurrence.

(d) Transferor or Transferee of Claim. A person who has transferred or acquired a claim for the purpose of commencing a bankruptcy case shall not be a qualified petitioner. A petitioning creditor who is a transferor or transferee of a claim, whether transferred unconditionally, for security, or otherwise, shall annex to ~~each of the triplicate petitions~~ the original and each of the 2 copies of the petition a copy of all documents evidencing the transfer, and a signed statement setting forth the consideration for and terms of the transfer and that the claim was not transferred for the purpose of commencing a bankruptcy case.

(e) Joinder of Petitioners After Filing. Creditors other than the original petitioners may join in an involuntary petition at any time before its dismissal. If the answer to an involuntary petition filed by one or 2 credi-

tors avers the existence of 12 or more creditors, the alleged bankrupt shall file with the answer a list of all his creditors with their addresses, a brief statement of the nature of their claims, and the amounts thereof. If it appears that there are 12 or more creditors as counted under § 59e of the Act, the court shall thereupon afford a reasonable opportunity for other creditors to join in the petition before a hearing is held thereon.

ADVISORY COMMITTEE'S NOTE

Subdivision (a). Official Form No. 9 (Creditors' Petition for Bankruptcy), prescribed for use by creditors as petitioners to have a debtor adjudged an involuntary bankrupt, is a revision of the official form for an involuntary petition promulgated under former § 30 of the Bankruptcy Act. A petition by fewer than all the general partners to have a partnership adjudged bankrupt is governed by Rule 105(b). The requirement of § 59c of the Act that the petition be filed in triplicate is continued, although under the bankruptcy docket and case reporting system in effect since January 1, 1963, the clerk of the United States district court typically sends to the referee all copies of the original petition and schedules. AOUSC Bulletin No. 506, dated Oct. 17, 1962, at p. 6. One copy of the petition is served on the bankrupt pursuant to Rule 111, another is retained by the referee as part of the record of the case, and the third copy, together with the schedules and the statement of affairs, is for the trustee. If, as in some districts where there is a geographical separation of the clerk's and referee's offices, the judges require the clerk to retain a copy of the petition and schedules, the rule recognizes the validity of a variant local rule requiring an additional copy.

Subdivision (b) is substantially a statement of the case law on the effect of participation by a petitioner in an act of bankruptcy, as supplemented by § 59h of the Act.

Only the original need be signed and verified, but the copies must be conformed to the original. See Rule 911(c). The petition must be filed with the clerk as provided in Rule 509(a). As provided in Rules 401 and 601, the filing of the petition acts as a stay of certain acts and proceedings against the bankrupt and his property.

See 3 Collier ¶ 59.39 (1964); MacLachlan, *Bankruptcy* § 60 (1956); Anno., 6 A.L.R.3d 476 (1966). The provision in the second sentence relieving a petitioner from the disqualification otherwise imposed by participation in an adjustment or settlement when such participation was without knowledge of the commission of one of the first three acts of bankruptcy may go beyond existing law, but it is supported by the rationale of the cases. See, *e.g.*, *In re Thomas*, 211 F.Supp. 187, 191 (D.Colo. 1962), aff'd sub nom. *Thomas v. Youngstown Sheet & Tube Co.*, 327 F.2d 667 (10th Cir.), cert.denied, 379 U.S. 827 (1964); *Dinerman v. Bowley & Travers, Inc.*, 301 F.2d 464, 467 (2d Cir. 1962); *In re Curtis*, 94 Fed. 630, 632 (7th Cir. 1899).

Subdivision (c) is a statement of case law. See 1 Collier ¶¶ 3.106, 3.207 (1961); MacLachlan, *Bankruptcy* § 59 (1956). Compare Rule 9(b) of the Federal Rules of Civil Procedure, requiring particularity in all averments of fraud, discussed in 2 Moore, *Federal Practice* ¶ 9.03 (2d ed. 1948). The amenability of the allegations of a petition respecting the commission of an act of bankruptcy to an amendment that will relate back to the date of the filing of the petition is governed by the case law construing Rule 15(c) of the Federal Rules of Civil Procedure, which is made applicable to such an amendment by Rule 121. See *Dworsky v. Alanjay Bias Binding Corp.*, 182 F.2d 803, 805 (2d Cir. 1950); *Glint Factors, Inc. v. Schnapp*, 126 F.2d 297 (2d Cir. 1942); 2 Collier ¶ 18.26 (1966); 3 Moore, *Federal Practice* ¶ 15.15[5] (2d ed. 1964). (Hereinafter citations to the Moore treatise will omit the title and reference to the edition but will include the date of the revision of the cited material.)

Subdivision (d) is a revision of General Order 5(2). A signed statement of the petitioning creditor is made acceptable in lieu of the affidavit required by the general order, in line with the policy declared in Rule 911(b) and discussed in the Note accompanying that provision. The implication of the general order that a transfer for the purpose of commencing a bankruptcy case is a ground for disqualification of a party to the transfer as a petitioner is made explicit. Compare § 146(1) of the Act;

Rule 23.1(1) of the Federal Rules of Civil Procedure. The subdivision requires disclosure of any transfer of his claim by the petitioner as well as a transfer to him and applies to transfers for security as well as unconditional transfers. *Cf. In re 69th & Crandon Bldg. Corp.*, 97 F.2d 392, 395 (7th Cir.), cert.denied, 305 U.S. 629 (1938), recognizing the right of a creditor to sign a bankruptcy petition notwithstanding a prior assignment of his claim for the purpose of security. This rule does not, however, qualify the requirement of § 59b of the Act that a petitioning creditor must have a provable claim not contingent as to liability.

Subdivision (c) is derived from § 59d and f of the Act but does not include the provision for notice by the court to all creditors. The interests of creditors are adequately protected by a provision requiring a reasonable opportunity for other creditors to join in the petition before the hearing is held. The list of creditors filed by the bankrupt affords a petitioner in such a case the information needed to enable him to give notice for the purpose of obtaining the copetitioners required to make the petition sufficient. The statutory requirement that the list be verified is eliminated pursuant to the policy expressed in Rule 911(b). It has been held that a creditor who desires to secure the administration of a debtor's estate in bankruptcy may properly solicit other creditors to join him in filing a petition. *In re Kootenai Motor Co.*, 41 F.2d 403 (D.Idaho 1930); *In re Smith*, 176 Fed. 426, 435 (N.D.N.Y. 1910). After a reasonable opportunity has been afforded for other creditors to join in an involuntary petition, the hearing on the petition should be held without further delay. The last sentence of § 59d is omitted from the rule as unnecessary.

Rule 105. Partnership Bankruptcy

(a) *Voluntary Petition.* A voluntary petition may be filed by all the general partners on behalf of the partnership.

(b) *Partner's Petition Against Partner-*

ship. A petition may be filed by fewer than all the general partners to have a partnership adjudged bankrupt under § 5b of the Act. ~~A~~ petition filed under this subdivision shall be in triplicate, but if more than one general partner does not join in the petition, an additional copy for each such partner shall be filed. The petition for adjudication of the partnership may be contested by any general partner (or alleged general partner) who is not a petitioner.

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(c) Involuntary Petition by Creditors. An involuntary petition may be filed by creditors against a partnership. Within 5 days after the filing, the petitioning creditors shall cause a copy of the petition to be sent by certified mail to the last known address of, or to be delivered to, each general partner who has not been served.

(d) Petition When All ~~Parties~~ Are Adjudicated. If all the general partners of a partnership are adjudged bankrupt, any party in interest may file a petition in any court in which a partner's bankruptcy case is pending to have the partnership adjudged bankrupt.

General Partners

ADVISORY COMMITTEE'S NOTE

This rule is derived from subdivisions a, b, and i of § 5 of the Act and authorizes 4 types of petitions to have a partnership adjudged bankrupt. The joint petitions authorized by § 5 of the Act are abolished by this rule. The statutory provisions for this kind of petition have caused confusion as to the filing fees chargeable and the manner of preparing schedules and statements of affairs. The advantages of joint administration of partnership and

partners' estates where that is feasible are obtainable under Rule 117. Subdivision (d) is an elaboration of the first sentence of § 5i of the Act. See Kennedy, *A New Deal for Partnership Bankruptcy*, 60 Col.L.Rev. 610, 646–49 (1960). The duty to prepare and file schedules and the statement of affairs for the partnership adjudicated on a petition filed under this rule rests on the general partners. See Rule 108(c).

of

Rule 106. Caption ~~of~~ Petition

The caption of every petition shall comply with Rule 904(b). In addition the title of the case as set forth in the caption shall include the name of the bankrupt and all other names used by him within 6 years before the filing of the petition. If the petition is not filed by the bankrupt, the petitioners shall include such other names according to their best information.

ADVISORY COMMITTEE'S NOTE

The second and third sentences of this rule adopt a feature found in some local rules. See, *e.g.*, N.D. Ill. Bankr.R. 5(B)(2); S.D. & E.D. N.Y. Bankr. R. 1(b). Additional names of the bankrupt are also required to appear in the caption of each notice to creditors. See Rule 203(i).

Rule 107. Filing Fees

(a) General Requirement. Except as otherwise provided in subdivision (b), every petition shall be accompanied by the prescribed filing fees.

(b) Payment of Filing Fees in Installments.

(1) Application for Permission to Pay Filing Fees in Installments. A voluntary petition shall be accepted for filing by the clerk of the district court if accompanied by

an application signed by the petitioner for permission to pay the filing fees in installments. The application shall state ~~the facts showing the necessity for payment of~~ the filing fees in installments, the proposed terms of such installment payments, and that the applicant has paid no money to his attorney for services in connection with the case. The application shall be filed in duplicate, one copy for the clerk and one for the bankruptcy judge.

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(2) Action on Application. At or prior to the first meeting of ~~the~~ creditors, the court after a hearing may make an order permitting the payment of the filing fees in installments to the clerk of the district court, and fixing the number of installments and the amount and date of payment of each installment. The number of installments permitted shall not exceed 4, and the final installment shall be payable not later than 4 months after the ~~date of~~ filing of the petition. For cause shown, however, the court may extend the time for payment of any installment to a date not later than 6 months after the date of filing of the petition.

(3) Postponement of Attorney's Fees. Filing fees must be paid in full before the bankrupt may pay his attorney for services in connection with the case.

ADVISORY COMMITTEE'S NOTE

Subdivision (a). Filing fees for bankruptcy cases are prescribed by §§ 40c(1), 48c, and 52a of the Act. Additional fees and charges may be prescribed in accordance with schedules and regulations approved by the Judicial

Conference of the United States pursuant to §§ 40c(2) and (3) of the Act and 28 U.S.C. § 1914(b).

Subdivision (b) is a revision of paragraph (4) of former General Order 35. The payment of filing fees in installments pursuant to the provisions of this general order has been explicitly authorized by §§ 40c(1), 48c, and 52a of the Act. The verification requirement imposed by the general order has been eliminated in conformity with the policy of Rule 11 of the Federal Rules of Civil Procedure. The subdivision allows the court to act on the application in advance of the first meeting or at that meeting. Reference in General Order 35(4) to "any adjournment thereof" is ~~deleted~~ omitted from the rule as unnecessary since an adjournment continues the first meeting. The administrative cost of installments in excess of 4 is disproportionate to the benefits conferred, and prolongation of the period of payment beyond 6 months after bankruptcy causes undesirable delays in administration. Paragraph (2) accordingly imposes a maximum of 4 on the number of installments and reduces the period of installment payments allowable on an original application from 6 to 4 months. Only in extraordinary cases should it be necessary to give an applicant an extension beyond the 4 months allowable ~~in~~ on the original application. The requirement of paragraph (3) that filing fees be paid in full before the bankrupt shall pay ~~any money to~~ his attorney for services in connection with the bankruptcy case codifies the rule declared in *In re Lehigh*, 271 Fed. 538 (S.D.N.Y. 1921), and *In re Darr*, 232 Fed. 415 (N.D.Cal. 1916). This has also been a local rule in force in a number of districts. *E.g.*, N.D.Ill. Bankr. Rule 6B; D.Ore. Bankr. Rule 83(c); E.D.Va. Bankr. Rule 7(b).

Rule 108. Schedules and Statement of Affairs

(a) Schedules and Statement Required. The bankrupt shall file with the court schedules of all his debts and all his property and a statement of his affairs, prepared by him in the manner prescribed by Official Forms

either

No. 6 and No. 7 or No. 8, whichever is appropriate. The number of copies of the schedules and statement shall correspond to the number of copies of the petition required by these rules.

(b) Time Limits. Except as otherwise provided herein, the schedules and statement shall be filed with the petition by a voluntary bankrupt and within 10 days after adjudication by an involuntary bankrupt or by a partnership adjudicated on other than a voluntary petition. A voluntary petition shall nevertheless be accepted by the clerk if accompanied by a list of all the bankrupt's creditors and their addresses, and the schedules and statement may be filed within 10 days thereafter in such case. On application the court may grant up to 10 additional days for the filing of schedules and the statement of affairs; any further extension may be granted only for cause shown and on such notice as the court may direct.

(c) Partnership and Partners. If the bankrupt is a partnership, the general partners shall prepare and file the schedules of the debts and property and statement of affairs of the partnership. Every general partner not adjudicated shall file a statement of his assets and liabilities with the trustee of the partnership within 10 days after qualification by the trustee or within such further time as may be allowed by the court for cause shown.

(d) Preparation of Schedules on Default by Bankrupt. If the schedules or statement

or Statement of Affairs

of affairs

is not prepared and filed as required by this rule, the court may order the receiver, trustee, a petitioning creditor, or other party in interest to prepare and file any of these papers within such time as the court shall fix.

(e) Interests Acquired or Arising After Bankruptcy. Within 10 days after the information comes to his knowledge or within such further time as the court may allow, the bankrupt shall file a supplemental schedule showing the facts regarding (1) any property that vests in him by bequest, devise, or inheritance within 6 months after bankruptcy; (2) any property in which the bankrupt had an estate or interest by the entirety on the date of bankruptcy and which became transferable in whole or in part solely by the bankrupt within 6 months after bankruptcy; and (3) any interests in real property that were nonassignable prior to bankruptcy and that, within 6 months thereafter, became assignable interests or estates, or gave rise to powers in the bankrupt to acquire assignable interests or estates. If any of the property or interests required to be reported under this subdivision is claimed by the bankrupt as exempt, he shall claim his exemption in the supplemental schedule. The duty to file a supplemental schedule in accordance with this subdivision continues notwithstanding the closing of the case before the duty is or can be performed.

ADVISORY COMMITTEE'S NOTE

Subdivision (a). This rule is an elaboration of § 7a(8)

and (9) of the Act. The list of creditors required by § 7a(8) has been referred to in Schedule A of Official Form No. 6 as the schedule of debts, and the latter designation is employed in the rules and official forms as revised. The cited clauses of § 7a have required the schedule of property, list of creditors, and statement of affairs to be filed in triplicate, and § 59e of the Act has required petitions to be filed in the same number. Rules 103, 104, and 105 ~~likewise~~ require ~~petitions~~ to be filed ~~in triplicate~~, but if more than one general partner does not join in a petition filed under Rule 105(b), an additional copy for each such partner must be filed. Each required copy of a petition must be accompanied by a copy of the schedules and statement of affairs.

an original and 2 copies of each petition

Only the original need be signed and verified, but the copies should be conformed to the original. See Rule 911(c).

Subdivision (b) retains the requirement of § 7a(8) of the Act that the schedules of property and debts be filed with any voluntary petition unless a list of creditors and their addresses accompanies the petition. Whereas the latter option is available to the bankrupt under the Act only if the court for cause shown gives him further time for filing the schedules, however, the rule allows the bankrupt who submits a creditor list with his petition 10 more days for the filing of complete schedules without the necessity of applying for and obtaining an extension from the court. A voluntary bankrupt frequently has an urgent need for relief available under the Act, and allowing him up to 10 days in which to provide the information required on the schedules and in the statement of affairs will be less productive of administrative inconvenience and delay than the present requirement that an extension be granted only on application. A bankrupt adjudicated on an involuntary petition and a partnership adjudicated on a petition of less than all the partners under Rule 105(b) or on a petition filed under Rule 105(d) when all the partners have been adjudicated are given 10 days after the adjudication in which to file the schedules. This is 5 days more than § 7a(8) now allows the involuntary bankrupt, but the rule should cut down the number of requests by involuntary bankrupts for an extension. The provision fixing the time limits on the filing of schedules and the statement of affairs by a partnership

adjudicated on a petition by less than all the partners or when all of them have been adjudicated fills a lacuna in the law. Extensions of time beyond the 10-day periods allowed by the first and second sentences of subdivision (b) and beyond the discretionary extension of up to 10 additional days authorized by the first clause of the last sentence of subdivision (b) are governed by the last clause of that sentence and by Rule 906(b).

Submission of the statement of affairs, which § 7a(9) of the Act permits to be filed as late as 5 days before the first meeting of creditors, is made subject by subdivision (b) to the same time requirements as apply to the filing of the schedules of property and debts. Early disclosure of the information called for in the statement is no less needful and helpful for expeditious administration than is prompt filing of the schedules, and ordinarily there is no reason why the schedules and the statement should not be submitted at the same time.

Subdivision (c), prescribing who shall prepare and file schedules and the statement of affairs whenever a partnership is adjudicated, is new. While the duty to prepare and file the schedules and statement of affairs of a partnership attaches to all the general partners, one partner may sign these papers on behalf of the partnership. See, *e.g.*, the form of the oath on behalf of a partnership at the foot of Official Form No. 6. The second sentence of the subdivision embodies a rule frequently stated and applied by the courts. See *Armstrong v. Fisher*, 224 Fed. 97 (8th Cir. 1915); *Dickas v. Barnes*, 140 Fed. 849 (6th Cir. 1905); *In re Ira Haupt & Co.*, 240 F.Supp. 369, 371–72 (S.D.N.Y. 1965); *In re Sugar Valley Gin Co.*, 292 Fed. 508 (N.D.Ga. 1923); Warren, *Corporate Advantages Without Incorporation* 285-86 (1929); *cf. Carter v. Whisler*, 275 Fed. 743, 747 (8th Cir. 1921). Most of the cases cited above were decided while former General Order VIII was in effect, and that general order required a nonadjudicated member of an adjudicated partnership to file a schedule of his debts and an inventory of his property in the same manner as if he had been individually adjudicated. The general order was revoked in 1925, 268 U.S. 712, because it authorized the adjudica-

tion of a partnership on the petition of less than all the partners. The Supreme Court had ruled in *Meek v. Centre County Banking Co.*, 268 U.S. 426 (1925), that since the Act as then written did not authorize such a petition, the general order was in excess of the rule-making power granted the Court by § 30 of the Act. A rule requiring a member of a duly adjudicated partnership to file a statement of his debts and property appears to be well within the rule-making power granted by 28 U.S.C. § 2075.

Subdivision (d) is a substantial revision of General Order 9. The general order deals only with the situation when an involuntary bankrupt is absent or cannot be found and in such case imposes the duty of filing a list of creditors and their addresses on petitioning creditors. The rule provides for any case in which the schedules or statement of affairs is not filed as required by giving the court a choice of persons and discretion as to the time for getting these documents prepared and filed. *Cf.* § 39a(2) of the Act; and see 1 Collier 982 (1960), for a discussion of the practice that has developed for handling such situations. A trustee, receiver, or other party ordered by the court to file schedules or a statement of affairs may request the court to authorize the employment of an assistant in connection with the preparation of these papers. Employment of an accountant by the trustee or receiver must be approved by the court in accordance with Rule 215, and the accountant's compensation would be governed by Rule 219 and §§ 62a(1) and 64a(1) of the Act.

Subdivision (e), which is new, provides a procedure for getting information as to any postbankruptcy acquisition of the bankrupt that passes to the trustee as part of the estate. See 4A Collier ¶¶ 70.17[8], 70.27, 70.37 (1967). A case presenting no controversy or complication may be closed before the end of the 6-month period during which the bankrupt is subject to the duty of disclosure imposed by this subdivision. *Cf.* 1 Collier 280 (1968). The supplemental schedule should be filed in the same place and manner as if the case had not been closed. The case need not be reopened in order for the schedule to be filed but

the filing (or failure to file) may be the precipitating cause for an order to reopen.

Rule 109. Verification of Petitions and Accompanying Papers

All petitions, schedules, statements of affairs, and amendments thereto shall be verified.

ADVISORY COMMITTEE'S NOTE

This rule combines requirements prescribed by §§ 7a(8) and 18c of the Act.

Only the original need be signed and verified, but the copies must be conformed to the original. See Rule 911(c).

Rule 110. Amendments of Voluntary Petitions, Schedules, and Statements of Affairs

A voluntary petition, schedule, or statement of affairs may be amended as a matter of course at any time before the case is closed. The court may, on application or motion of any party in interest or on its own initiative, order any ~~defective~~ voluntary petition, schedule, or statement of affairs to be amended. Every amendment under this rule shall be filed in the same number as required of the original paper, and the court shall give notice of the amendment to such persons as it may designate.

ADVISORY COMMITTEE'S NOTE

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General Order 11, from which this rule is derived, has required an application for leave to amend a petition or schedule. While this rule adopts a permissive approach to amendment of a voluntary petition, schedule, or state-

men of affairs, it contemplates that every amendment shall be brought to the attention of the court so that it may determine who, if anyone, should be notified of the amendment. A notice to the trustee is appropriate whenever the debtor amends his schedule of property. If additional property is claimed as exempt by the amendment, the trustee must act thereon in accordance with Rule 403. An amendment will ordinarily be filed with the referee. See Rule 509. If a copy of the petition, schedule, or statement being amended is retained by the clerk, a copy of each amendment should be transmitted by the referee to the clerk. If a schedule is amended to include an additional creditor, the effect on the dischargeability of the creditor's claim is governed by the provisions of § 17 of the Act (see particularly § 17a(3)).

The second sentence of the rule is adapted from § 39a(3) of the Act.

Rule 111. Service of Petition and Process

Upon the filing of an involuntary petition, the clerk of the district court shall forthwith issue a summons for service on the bankrupt. Upon the filing of a partner's petition against a partnership under Rule 105(b), the clerk shall forthwith issue a summons for service upon all general partners who are not petitioners. The summons shall conform substantially to Official Form No. 10 and a copy shall be served with a copy of the petition in the manner provided for service of a summons, complaint, and notice of trial by Rule 704(b), (c), or (i). If service cannot be made as provided in the preceding sentence, the court may order the summons and petition to be served by mailing copies thereof to the last known address, if any, and by at least one publication in such manner and form as the court may direct. The summons and peti-

tion may be served anywhere. The provisions of Rule 704(e), (g), and (h) apply when service is made or attempted under this rule.

ADVISORY COMMITTEE'S NOTE

This rule is a revision of § 18a of the Act. The substitution of the summons for the writ of subpoena as the process to be served on the bankrupt conforms the usage in bankruptcy to that prevailing generally in civil litigation in federal courts. See 2 Collier ¶ 18.30 (1966). The modes of service prescribed by the rule are personal or by mail, when service can be effected in one of these ways in the United States. Service by either of these modes shall be made in the manner prescribed for personal service or service by mail in adversary proceedings in bankruptcy cases by Rule 704(b) and (c). If service must be made in a foreign country, the mode of service prescribed is one of those referred to in Rule 704(i), which incorporates Rule 4(i) of the Federal Rules of Civil Procedure.

When none of the 3 methods referred to in Rule 704(b), (c), and (i) can be utilized, service by publication coupled with mailing to the last known address is authorized. *Cf.* Rule 704(d)(2). The court determines the form and manner of the publication as provided in Rule 908. The publication need not set out the petition or the order directing service by publication. In order to apprise the bankrupt fairly, however, the publication should include all the information required to be in the summons by Official Form No. 10 and a notice indicating how service is being effected and how a copy of the petition may be obtained. Section 18a of the Act has provided that when personal service on the bankrupt cannot be had, service by publication may be made in the manner provided for suits to enforce a legal or equitable lien in courts of the United States. The procedure for such suits is that prescribed by 28 U.S.C. § 1655, which includes a provision authorizing the vacation of a judg-

ment at any time within a year after its entry if the defendant was not personally notified. As pointed out in the Note accompanying Rule 924, cases relying on this provision to vacate adjudications of bankruptcy entered without personal notice to the bankrupt are inapplicable to adjudications under these rules.

There are no territorial limits on the service authorized by this rule. Service on a bankrupt under § 18a of the Act has likewise not been limited by territorial boundaries when personal service within the state in which the court of bankruptcy sits has proved impracticable. *United States v. Kramer*, 279 F.2d 751, 83 A.L.R.2d 698 (3rd Cir.), cert. denied, 364 U.S. 879 (1960); *Bookey v. King*, 236 F.2d 871, 877 (9th Cir. 1956); *Benitez v. Anciani*, 127 F.2d 121, 126 (1st Cir.), cert. denied, 317 U.S. 699 (1942); *cf. Stegeman v. United States*, 425 F.2d 984, 987 n.4 (9th Cir. 1970); *Sidney L. Bauman Diamond Co. v. Hart*, 192 Fed. 498, 501–02 (5th Cir. 1911); *In re Berthoud*, 231 Fed. 529, 532–33 (S.D.N.Y.), appeal dismissed, 238 Fed. 797 (2d Cir. 1916). There must of course be a basis for jurisdiction of the bankrupt or his property in order for the court to adjudicate his bankruptcy and to administer his estate. Although Rule 116(a)~~, like § 2a(1) of the Act,~~ relates to venue rather than jurisdiction, the court would have no jurisdiction to act if none of the elements to be considered in the choice of venue could be found in the United States. ~~See~~ Seligson & King, *Jurisdiction and Venue in Bankruptcy*, 36 Ref.J. 36 (1962); Comment, 35 N.C.L.Rev. 476, 478 (1957).

Cf. § 2a(1) of the Act;

Subdivisions (e), (g), and (h) of Rule 704 govern time and proof of service, the effect of errors in service or proof thereof, and amendment of process or of proof of service.

Rule 112. Responsive Pleading or Motion

The alleged bankrupt in an involuntary petition, or, in the case of a petition against a partnership under subdivision (b) or (c) of

Rule 105, any general partner (or alleged general partner) who is not a petitioner, may contest the petition. Rule 12 of the Federal Rules of Civil Procedure applies to the making of a defense or objection to the petition, except that an answer or a motion permitted under Rule 12(b), (e), or (f) of the Federal Rules of Civil Procedure shall be served and filed within 15 days after the issuance of the summons, but if service is made by publication upon an alleged bankrupt or partner not an inhabitant of nor found within the state in which the district court is held, the court shall prescribe the time for such service and filing of the response. The service of a motion permitted under Rule 12 of the Federal Rules of Civil Procedure shall have the effect prescribed by Rule 712(a) on the time allowed for serving an answer to the petition, but any motion or answer served on the petitioner must be filed with the court no later than the last day allowed for service of the motion or the answer, as the case may be. The answer to a petition may include the statement of a claim against a petitioning creditor only for the purpose of defeating the petition. No other responsive pleadings shall be allowed, except that the court may order a reply to an answer and prescribe the time for it to be served and filed.

ADVISORY COMMITTEE'S NOTE

The first sentence of this rule is derived from § 18b of the Act. A petition filed by fewer than all the general

partners under Rule 105(b) to have the partnership adjudged bankrupt is referred to as a petition against the partnership because of the adversary character of the proceeding it commences. *Cf.* 2 Collier ¶ 18.38[2.1] (1966). One who denies an allegation of his membership in the firm is nevertheless recognized as a party entitled to contest a petition filed against a partnership under either subdivision (b) or (c) of Rule 105 in view of the possible consequences to him of an adjudication of the entity alleged to include him as a member. *Francis v. McNeal*, 228 U.S. 695 (1913); *Manson v. Williams*, 213 U.S. 453 (1909); *Carter v. Whisler*, 275 Fed. 743, 746 (8th Cir. 1921). The rule preserves the features of the Act permitting no response to a voluntary petition and permitting no response by creditors to an involuntary petition or petition against a partnership under Rule 105(b).

Rule 12 of the Federal Rules of Civil Procedure has been looked to by the courts as prescribing the mode of making a defense or objection to a petition in bankruptcy. See *Fada of New York, Inc. v. Organization Service Co., Inc.*, 125 F.2d 120, (2d Cir. 1942); *In re McDougald*, 17 F.R.D. 2, 5 (W.D.Ark. 1955); *In re Miller*, 6 Fed.Rules Serv. 12f.26, Case No. 1 (N.D.Ohio 1942); *Tatum v. Acadian Production Corp. of La.*, 35 F.Supp. 40, 50 (E.D.La. 1940); 2 Collier, *supra* at 134–40. As pointed out in the Note accompanying Rule 915 an objection that an alleged bankrupt is neither entitled to the benefits of the Act nor amenable to adjudication as an involuntary bankrupt goes to jurisdiction of the subject matter and may be made at any time consistently with Rule 12(h)(3) of the Federal Rules of Civil Procedure. Nothing in this rule recognizes standing in a creditor or any other person not authorized to contest a petition to raise an objection that a person eligible to file a voluntary petition cannot be adjudicated on an involuntary petition. See Seligson & King, *Jurisdiction and Venue in Bankruptcy*, 36 Ref.J. 36, 38–40 (1962).

As Collier has pointed out, "the mechanics of the provisions in § 18a and b relating to time for appearance and pleading are unnecessarily confusing. . . . These re-

sults [giving the respondent at least 10 days after service without permitting undue extension of the period for appearance and pleading] could be reached more expeditiously and with less confusion by amending § 18 so as to adapt the procedure provided for in Federal Rule 12(a)...." 2 Collier, *supra* at 103–04. The time normally allowed for the service and filing of an answer or motion under Rule 112 runs from the date of the issuance of the summons to the bankrupt. *Cf.* Rule 712(a), fixing the time for serving an answer to a complaint commencing an adversary proceeding by reference to the issuance of the summons that accompanies it. Service of the summons and petition will ordinarily be made by mail under Rule 111 and must be made within ~~5~~ 3 days of the issuance of the summons under Rule 704(e), which governs the time of service. The 15 days normally allowed by this rule for serving the response is thus comparable to the period that has been prescribed by § 18a and b of the Act. When service is made by publication, the court should fix the time for service and filing of the response in the light of all the circumstances so as to afford a fair opportunity to the bankrupt to enter a defense or objection without unduly delaying the hearing on the petition. *Cf.* Rule 12(a) of the Federal Rules of Civil Procedure.

As provided in the third sentence of the rule, the timely service of a motion permitted by Rule 12(b), (c), (e), (f), or (h) of the Federal Rules of Civil Procedure alters the time within which an answer must be filed. If the court denies a motion or postpones its disposition until trial on the merits, the answer must be served within 5 days after notice of the court's action. If the court grants a motion for a more definite statement, the answer may be served any time within 5 days after the service of the more definite statement.

As provided in Rule 121 many of the rules governing adversary proceedings apply to proceedings on a contested petition unless the court otherwise directs. The specific provisions of this Rule 112 rather than Rule 705(b), however, govern the filing of an answer or motion responsive to a petition. The rules of Part VII are adaptations of the corresponding Federal Rules of Civil

Procedure, and the effect of Bankruptcy Rule 121 is thus to make the provisions of Civil Rules 5(a), 8, 9, 15, and 56 *inter alia* generally applicable to the making of defenses and objections to the petition. Rule 121, follows prior law and practice in this respect. See 2 Collier, *supra* ¶¶ 18.39–18.41.

The next to the last sentence adopts the position taken in many cases that an affirmative judgment against a petitioning creditor cannot be sought by a counterclaim filed in an answer to a petition in a bankruptcy case. See, *e.g.*, *Georgia Jewelers, Inc. v. Bulova Watch Co.*, 302 F.2d 362, 369–70 (5th Cir. 1962); *Associated Electronic Supply Co. of Omaha v. C.B.S. Electronic Sales Corp.*, 288 F.2d 683, 684–85 (8th Cir. 1961). The sentence follows *Harris v. Capehart-Farnsworth Corp.*, 225 F.2d 268 (8th Cir. 1955), in permitting the alleged bankrupt to challenge the standing of a petitioner by filing a counterclaim against him. See also *In re Automatic Typewriter & Service Co.*, 271 Fed. 1, 4 (2d Cir. 1921), and *In re Paige*, 99 Fed. 538 (N.D. Ohio 1899), recognizing the propriety of the bankrupt's alleging a counterclaim in an answer that denies his insolvency. The sentence does not foreclose the court from rejecting a counterclaim that cannot be determined without unduly delaying the decision upon the adjudication. See *In re Bichel Optical Laboratories, Inc.*, 299 F.Supp. 545, 550 (D.Minn. 1969). The last sentence makes it clear that no reply needs to be made to an answer, including one asserting a counterclaim, unless the court thinks one would be helpful and orders it.

Rule 113. Affirmative Defense of Solvency

If a petition alleges the commission of the first act of bankruptcy, the alleged bankrupt shall plead and have the burden of proving the defense of solvency at the date of bankruptcy.

ADVISORY COMMITTEE'S NOTE

This rule implements the provision in § 3c of the Act that solvency shall be a defense to the commission of the first act of bankruptcy by prescribing how the defense shall be pleaded and proved.

Rule 114. Examination of Bankrupt on Issue of Insolvency or Inability To Pay Debts as They Mature

Whenever a petition filed under Rule 104 alleges the commission of the second, third, or fifth act of bankruptcy or a petition is filed under Rule 105(b), and the alleged bankrupt denies the allegation of insolvency or inability to pay debts as they mature, the alleged bankrupt shall appear in court ~~on~~ at the hearing, and prior thereto if ordered by the court, with books, papers, and accounts, and submit to an examination as to all matters bearing on the issue of insolvency or inability to pay debts as they mature. If the alleged bankrupt fails so to appear or submit to an examination, the court on motion may make such orders in regard to the failure as are just, including those specified in paragraphs (A), (B), and (C), of Rule 37(b)(2) of the Federal Rules of Civil Procedure.

The examination provided by this rule is not exclusive of the procedures available under Rules 121 and 205.

ADVISORY COMMITTEE'S NOTE

This rule is derived from § 3d of the Act but goes beyond it by making 3 of the sanctions provided by Rule 37 of the Federal Rules of Civil Procedure for failure to obey an order to provide or permit discovery available against an alleged bankrupt who fails to comply with the duty imposed by the rule. The rule thus departs from the

holding in *In re Richards Discount Jewelers, Inc.*, 303 F.Supp. 517, 518 (S.D.N.Y. 1969), and *In re Shetland*, 210 F.Supp. 195, 199–200 (D.Mont. 1962), that § 3d of the Act is inconsistent with Rule 37 of the Federal Rules of Civil Procedure and prescribes [illegible]y consequence for failure of the bankrupt to a[illegible] his papers and submit to an examination on the issue of insolvency or inability to pay debts as they mature.

SEE ATTACHED

~~The examination provided by this rule is not intended to be exclusive of other procedures available under these rules. See, e.g., Rules 121 and 205. Cf. 1 Collier ¶ 3.208[2] (1961), 2 id. ¶¶ 18.10[i.2], 18.41[7] (1966), and 2 id. ¶ 21.08 (1964).~~

Rule 115. Hearing and Disposition of Petition

(a) Contested Petition. The court shall determine the issues of a contested petition at the earliest ~~possible~~ practicable time and adjudicate the debtor a bankrupt, dismiss the case, or enter such other order as may be appropriate.

(b) Jury Trial.

(1) An alleged bankrupt may, at or before the time within which an answer may be filed, demand a trial by jury of any issue triable of right by a jury under § 19a of the Act, by serving upon the petitioners a demand therefor in writing and filing it. Such demand may be indorsed upon the answer. If the demand specifies that a district judge conduct the trial or if a local rule of court so provides, the trial shall be placed on the calendar of the district court as a jury action; otherwise the referee shall conduct the jury trial. The failure of a party to serve and file a demand in accordance with this rule constitutes a waiver by him of trial by jury or of a jury trial before a district judge, as the case may be.

INSERT ON p. 28

Rule 121 makes applicable in proceedings relating to a contested petition the rules governing discovery and deposition in adversary proceedings, which are adaptations of Rules 26-37 of the Federal Rules of Civil Procedure. Rule 205 is an adaptation of § 21a of the Act. The last sente ~ of this Rule 114 eliminates doubts as to the availability to petitioning creditors of the discovery procedures afforded to litigants generally in civil practice, and of an examination of the bankrupt and others in accordance with the practice that developed under § 21a of the Act. See 1 Collier ¶ 3.208[2](1961); 2 id. ¶¶ 18.10[1.2], 18.41[7](1966); 2 id. ¶ 21.08(1964).

(2) When trial by jury has been demanded in accordance with this rule, the trial of all issues so demanded shall be by jury unless the alleged bankrupt, by a writing filed with the court or by an oral statement made in open court and entered in the record, consents to trial by the court sitting without a jury. A trial with an advisory jury or a jury trial conducted as of right on consent of the parties may be ordered in accordance with Rule 39(c) of the Federal Rules of Civil Procedure.

(3) When issues triable of right by jury have been placed on the district court calendar as provided in paragraph (1) of this subdivision, the district judge may order the trial before him of any other issues presented by the pleadings in the interest of expediting the court's business or for other good cause.

(4) Except as provided in subdivision (d) of this rule, Rules 47–51 of the Federal Rules of Civil Procedure apply to a jury trial conducted under this subdivision.

(c) Default. If no pleading or other defense to a petition is filed within the time provided by these rules, the court shall on the next day, or as soon thereafter as practicable, make the adjudication or make such other order as may be appropriate.

(d) Adjudication. An adjudication shall conform substantially to Official Form No. 11 and shall be entered in the referee's docket or the civil docket of the district court, as the case may be.

pursuant to Rule 104(a) or Rule 105(b) or (c)

case commenced by the filing of a

or withdrawn,

(c) Award of Costs. When a petition against any person is dismissed the court on reasonable notice to the petitioner or petitioners may award to the prevailing party the same costs that are allowed to a prevailing party in a civil action and reasonable counsel fees, and shall award any other sums required by the Act.

ADVISORY COMMITTEE'S NOTE

Subdivision (a) is a revision of § 18d of the Act. ~~The requirement of the rule that the issues be determined at the "earliest possible time" is a more explicit and positive direction to the court to give priority to the hearing on a contested petition and its disposition than is the statutory guide, "as soon as may be."~~

Subdivision (b) of this rule preserves the right of trial by jury given by § 19 of the Act but recognizes that the alleged bankrupt may accept a jury trial before the referee if he does not specifically demand such a trial before the district judge and if a local rule does not prohibit a jury trial before a referee. The subdivision is an adaptation of Rules 38(b) and (d) and 39(a) and (c) of the Federal Rules of Civil Procedure. To preserve his right to a jury trial and, absent a local rule requiring every such trial to be on the district court's calendar, his right to a jury trial before a district judge, the alleged bankrupt must not only serve but file his demand within the time limits prescribed by this rule. The place of filing is governed by Rule 509. A case ordinarily remains with a referee after automatic reference in accordance with Rule 102(a) unless there is a demand for jury trial before a district judge under this rule or there is a transfer or revocation of a reference as provided in Rule 102(b). Paragraph (3) of subdivision (b) represents a modest extension of the district judge's authority in respect of a bankruptcy case to permit the exercise of his discretion in appropriate cases to minimize the unseemly consequences of fragmentation of the trial of issues arising on a petition.

Except as otherwise provided in this and other rules in Part I and subject to the authority of the court to direct otherwise, the rules in Part VII that govern adversary proceedings apply directly, or may be made applicable by direction of the court, to the proceedings on a contested petition. See Rule 121. When there is a jury trial, the provisions governing jurors, verdicts, instructions to juries, and related matters in Rules 47–51 of the Federal Rules of Civil Procedure apply, as provided in paragraph (4) of subdivision (b) of this rule. For the purposes of applying Civil Rule 49(b), however, subdivision (d) of this rule (rather than Rule 58, to which Civil Rule 49(b) refers) shall govern the entry of the adjudication.

Subdivision (c) is derived from § 18e of the Act. If adjudication is not made on default, dismissal will ordinarily be the appropriate disposition as provided in § 18e, but the court may find reason to postpone definitive action of either kind pending particular developments. See, *e.g.*, §§ 325, 425, and 625 of the Act. For good cause shown an adjudication on default may be set aside in accordance with Rule 924.

Subdivision (d). When an adjudication is made by the referee, it shall be entered on the referee's docket kept by him as provided in Rule 504(a). When the adjudication is by the district judge, it shall be entered in the civil docket kept by the clerk as provided in Rule 79(a) of the Federal Rules of Civil Procedure.

Subdivision (e). General authority for an award of costs to a prevailing party is found in § 2a(18) of the Act. General Order 34 has provided in its first clause for the recovery by a petitioning creditor of costs when adjudication is made on a contested involuntary petition. This provision was effectively superseded, however, by the 1962 amendment of § 64a(1) of the Bankruptcy Act, which explicitly authorizes allowance, as an administrative expense entitled to first priority, of "the reasonable costs and expenses incurred, or the reasonable disbursements made," by petitioning creditors, "including but not limited to compensation of accountants and appraisers employed by them." The first clause of General Order

34 is accordingly not carried over into this rule. Subdivision (c) embodies the substance of the last clause of General Order 34, authorizing recovery of costs by the debtor in the event of dismissal, and recognizes the right of the alleged bankrupt under § 69b of the Act to costs, counsel fees, and indemnification for expenses and damages caused by the action of a receiver or marshal in taking or holding his property. An award may be made under this subdivision in the event of a dismissal on account of a withdrawal of the petition as well as by reason of an involuntary dismissal.

Rule 116. Venue and Transfer

(a) Proper Venue.

(1) Natural Person. A petition by or against a natural person may be filed ~~only~~ in the district where the bankrupt has had his principal place of business, residence, or domicile for the preceding 6 months or for a longer portion thereof than in any other district. A petition by or against a natural person who has had no principal place of business, residence, or domicile within the United States during the preceding 6 months may be filed only in a district wherein he has property.

(2) Corporation or Partnership. A petition by or against a corporation or partnership may be filed ~~only~~ in the district (A) where the bankrupt has had its principal place of business or its principal assets for the preceding 6 months or for a longer portion thereof than in any other district, (B) or, if there is no such district, in any district where the bankrupt has property.

(3) Partner with Partnership or Copart-

see attached

ner. Notwithstanding the foregoing: (A) ~~if a petition by or against a partnership is filed in accordance with paragraph (2) of this subdivision, a petition may also be filed in the same district by or against any general partner; or (B) if a petition by or against a general partner is filed in accordance with paragraph (1) of this subdivision, a petition may be filed concurrently or thereafter in the same district by or against the partnership or by or against any other general partner or by or against any combination of the partnership and the general partners.~~

~~*(4) Affiliate.* Notwithstanding the foregoing, if a petition by or against a bankrupt is filed in accordance with any of the foregoing paragraphs of this subdivision, a petition may also be filed in the same district by or against an affiliate of the bankrupt.~~

(b) Transfer of Cases; Dismissal or Retention When Venue Improper.

When

(1) ~~Where~~ Venue Proper. Although a petition is filed in accordance with subdivision (a) of this rule, the court may, on notice to the petitioner or petitioners and such other persons as it may direct ~~and after hearing~~, in the interest of justice and for the convenience of the parties, transfer the case to any other district. The transfer may be ordered at or before the first meeting of creditors either on the court's own initiative or on motion of a party in interest but thereafter only on a timely motion.

after hearing

When

(2) ~~Where~~ Venue Improper. If a petition is filed in a wrong district, the court may, on

after hearing

a petition commencing a bankruptcy case may be filed by or against any general partner in a district where a petition under the Act by or against a partnership is pending; (B) a petition commencing a bankruptcy case may be filed by or against a partnership or by or against any other general partner or by or against any combination of the partnership and the general partners in a district where a petition under the Act by or against a general partner is pending.

(4) Affiliate. Notwithstanding the foregoing, a petition commencing a bankruptcy case may be filed by or against an affiliate of the bankrupt in a district where a petition under the Act by or against the bankrupt is pending.

notice to the petitioner or petitioners and such other persons as it may direct ~~and after hearing~~, dismiss the case or, in the interest of justice and for the convenience of the parties, retain the case or transfer it to any other district. Such an order may be made at or before the first meeting of creditors either on the court's own initiative or on motion of a party in interest but thereafter only on a timely motion. Notwithstanding the foregoing, the court may without a hearing retain a case filed in a wrong district if no objection is raised.

(c) Procedure When Petitions Involving the Same Bankrupt or Related Bankrupts Are Filed in Different Courts. If petitions are filed in different districts by or against (1) the same bankrupt, or (2) a partnership and one or more of its general partners, or (3) 2 or more general partners, or (4) a bankrupt and an affiliate, the court in which the first petition is filed shall, ~~upon~~ motion and notice to the petitioners and such other persons as the court may designate ~~and after hearing~~, determine the court or courts in which the cases should proceed in the interest of justice and for the convenience of the parties. The proceedings ~~upon~~ the other petitions shall be stayed by the courts in which such petitions have been filed until such determination is made. Thereafter all the courts in which petitions have been filed shall proceed in accordance with the determination.

(d) Reference of Transferred Cases. A

commencing bankruptcy cases or a bankruptcy case and any other case under the Act

after hearing on

case or

case transferred under this rule shall, in accordance with Rule 102(a), be referred by the clerk of the district court to which it has been transferred.

ADVISORY COMMITTEE'S NOTE

Subdivision (a). Paragraphs (1) and (2) of subdivision (a) of this rule are a revision of § 2a(1) of the Act. Although the statutory provision is phrased in terms of jurisdiction, it is now settled that it relates to venue. *Bass v. Hutchins*, 417 F.2d 692, 694-95 (5th Cir. 1969); *In re Eatherton*, 271 F.2d 199, 201-03 (8th Cir. 1959); Seligson & King, *Jurisdiction and Venue in Bankruptcy*, 36 Ref.J. 36 (1962). The revision of the statutory provision effected by the rule consists primarily in a reorganization for the purpose of clarification. Paragraph (2) of subdivision (a), however, eliminates the notion that residence or domicile may serve as a useful basis for determining venue of a corporation or partnership. The reference in this paragraph to location of the principal assets as a criterion of venue in a petition by or against a corporation or a partnership is derived from § 128, the general venue provision of Chapter X of the Act.

~~Paragraph (3) of subdivision (a) incorporates and extends the principle embodied in § 5d of the Act. Like § 2a(1), § 5d is a venue provision couched in jurisdictional terms. See 1 Collier ¶ 2.17[1]. Clause (B) of subdivision (a)(3) of the rule is a restatement of the effect of § 5d of the Act. Clause (A), which is new, is the obverse of clause (B): if the filing of a petition by or against a partner in a proper court of bankruptcy makes the court's district also proper venue for the partnership and the other partners, *a fortiori* the filing of a petition by or against a partnership in a proper court makes the venue chosen also proper for the partners. Rule 117 authorizes joint administration of partnership and partners' estates under appropriate circumstances.~~

Paragraph (4) of subdivision (a) is derived from but goes considerably beyond § 129 of the Act, which authorizes a petition by or against a subsidiary to be filed in a court which has approved a Chapter X petition by or

The statutory reference to "property within their jurisdiction" may be viewed as establishing jurisdiction as well as prescribing venue. Cf. Comment, 35 N.C.L. Rev. 476, 477-78 (1957)

primarily

insofar as it speaks of principal place of business, residence, and domicile.

see attached

Paragraph (3) of subdivision (a) extends the principle embodied in § 5d of the Act. Like § 2a(1) of the Act, § 5d has served primarily as a venue provision though couched in jurisdictional terms. See 1 Collier ¶ 2.17[1] (1968). Paragraph (3) goes beyond § 5d by permitting a petition to be filed by or against a partner or partnership in a district because of the pendency there of a case which may not have been filed in accordance with the provisions of paragraph (1) or (2) of the subdivision that prescribe proper venue for such a case. The procedure for effecting a transfer of both cases, if in the interest of justice and for the convenience of the parties, is provided in subdivision (b). Paragraph (3) of subdivision (a) is also new in permitting a petition in bankruptcy to be filed in a district because of the pendency there of a case commenced under one of the debtor relief chapters. Rule 117 authorizes joint administration of partnership and partners' estates under appropriate circumstances.

against its parent corporation. An "affiliate" is defined in Rule 901(3) to include a subsidiary as defined in Chapter X of the Act (§ 106(13)), a parent corporation, and a variety of persons having connections different from those contemplated by §§ 106(13) and 129 of the Act. Joint administration of the estates of affiliates may be authorized under Rule 117.

Subdivision (b) of the rule incorporates the features of § 32b and c of the Act and clarifies the procedure to be followed in requesting and effecting transfer of a case. While § 32b, which deals with cases filed in the wrong court of bankruptcy, authorizes transfer only on the filing of an objection, § 32c, which deals with transfer of cases even though filed in a proper venue, curiously appears to require no objection by a party in interest. Subdivision (b) authorizes the court to transfer a case on its own initiative as well as on motion, irrespective of whether the venue is proper or improper, but protects the parties against being subjected to a transfer in either event after the first meeting of creditors except on a timely motion of a party in interest. If the transfer would result in fragmentation or duplication of administration, increase expense, or delay closing the estate, such a factor would bear on the timeliness of the motion as well as on the propriety of the transfer under the standards prescribed in subdivision (b). Section 32b, in authorizing a transfer from a wrong court to a proper court of bankruptcy, requires the judge to act in the "interest of justice," whereas § 32c authorizes the judge to transfer any case to a court of bankruptcy in any other district if the interests of the parties will be best served thereby. Subdivision (b) of the rule requires the interest of justice and the convenience of the parties to be the grounds of any transfer of a case or of the retention of a case filed in a wrong district. *Cf.* 28 U.S.C. §§ 1401(a) (district court may transfer any civil action "[f]or the convenience of parties and witnesses, in the interest of justice") and 1406 (district court "shall dismiss or, if it be in the interest of justice, transfer" a case "laying venue in the wrong division or district"). The subdivision expressly requires a hearing on notice to the petitioner or

This requirement applies as well when the court acts on its own initiative as when it transfers or dismisses a case on motion.

petitioners before the transfer of any case may be ordered and before a case filed in the wrong district may be dismissed.

Although it has been said that under § 32 a court of bankruptcy cannot dismiss a case though filed in the wrong district, see, *e.g.*, *In re Bankers Trust*, 403 F.2d 16, 22–23 (7th Cir. 1968); *In re Eatherton*, 271 F.2d 199, 201 (8th Cir. 1959), the rule recognizes dismissal as one of the options available to the court in such a case, as it is under the amendment of 1949 to 28 U.S.C. § 1406(a) when the wrong venue is selected for ordinary civil litigation in a federal district court. Transfer or retention would normally be in the interest of justice, however, unless the choice of the wrong venue appears deliberate and "smacks of harrassment or evidences some other element of bad faith" on the petitioner's part. 1 Moore 1909 (1961). If no motion objecting to venue or requesting a transfer is made, the court may retain the case without a hearing even though the venue is in fact improper. *Cf. Bass v. Hutchins*, 417 F.2d 692, 696 (5th Cir. 1969).

Section 32b and c of the Act purport to authorize only the judge to transfer a case to another court, but there is no procedure provided in either subdivision for a case that is automatically referred to the referee by the clerk pursuant to § 22a of the Act to come to the attention of the judge. Subdivision (b) vests the authority for determining the issues and entering orders thereunder in the court, which is ordinarily the referee.

It also authorizes the court in which the first petition is filed under the Act by or against a bankrupt to entertain a motion seeking a determination whether the case so commenced should continue or be transferred and consolidated or administered jointly with another case commenced by or against the same or a related person in another court under a different chapter of the Act.

Subdivision (c) is derived from § 32a of the Act and General Order 6. It extends the procedure provided by the statute and general order for petitions in different courts involving the same bankrupt and petitions involving members of the same partnership to petitions in different courts involving a partnership and one or more of its members and to petitions involving affiliates as defined in Rule 901(3). The courts have entertained requests for transfers of the kind contemplated in subdivision (c)(2) by stretching the language of §§ 5d and 32a of the Act. *In re Imperial "400" National, Inc.*, 429 F.2d 671, 679 (3d Cir. 1970); and see *In re Andreana Classics*, 131 F.Supp. 413, 414 (S.D.N.Y. 1955). Subdivision (c) is

correlated with paragraphs (3) and (4) of subdivision (a) of this rule, which authorize petitioners to bring cases involving a partnership and partners or affiliated bankrupts into a court of bankruptcy ~~that is proper for any one of the bankrupt persons~~. Subdivision (c), however, makes it the responsibility of the court receiving the first of the petitions that might have been but were not filed in the same court to determine whether transfer of the cases to one court or some other disposition of them would be appropriate. The standards, "interest of justice" and "convenience of the parties," are the same as those that govern transfers under subdivision (b) of the rule and are derived from § 32a and b of the Act.

The references in subdivision (a)(3) and (4) and subdivision (c) to petitions filed "by" a partner or "by" any other of the persons mentioned are to be understood as referring to voluntary petitions. There is no purpose in either subdivision to permit ~~cases~~ to be filed in ~~one~~ court because ~~any of the persons named therein is~~ a creditor signing an involuntary petition.

more than one case

the same

happens to be a partner, partnership, or an affiliate of a bankrupt.

Subdivision (d). Section 32 and General Order 6, which are the sources of the provisions of subdivisions (b) and (c) of Rule 116, are silent as to the procedure to be followed by the court to which a case is transferred. Subdivision (d) of this rule provides for an automatic reference in consonance with the procedure prescribed for handling cases originally filed in a court of bankruptcy.

adversary

Transfer of proceeding ~~within case~~. Transfers of adversary proceedings in bankruptcy are governed by Rule 782.

Rule 117. Consolidation or Joint Administration of Cases Pending in Same Court

(a) Cases Involving Same Bankrupt. If 2 or more petitions are pending in the same court by or against the same bankrupt, the court may order consolidation of the cases.

(b) Cases Involving 2 or More Related Bankrupts. If 2 or more petitions are pend-

ing in the same court by or against (1) a husband and wife, or (2) a partnership and one or more of its general partners, or (3) 2 or more general members of a partnership, or (4) a bankrupt and an affiliate, the court may order a joint administration of the estates.

Before making such an order the court shall give due consideration to the protection of creditors of the different estates against potential conflicts of interest.

(c) Expediting and Protective Orders. When an order for consolidation or joint administration of 2 or more cases is entered pursuant to this rule, the court, while protecting the rights of the parties under the Act, may make such orders as may tend to avoid unnecessary costs and delay.

ADVISORY COMMITTEE'S NOTE

Subdivision (a) of this rule is derived from General Order 7. It governs cases where the same debtor is named in both voluntary and involuntary petitions as well as cases where 2 or more involuntary petitions are filed against the same bankrupt. It also applies when the cases are pending in the same court by virtue of a transfer of one or more of the petitions from another court pursuant to Rule 116(b) or (c). Subdivision (c) allows the court discretion as to the order of trial of issues raised by 2 or more involuntary petitions against the same bankrupt.

Subdivision (b) recognizes the appropriateness of joint administration of estates in certain kinds of cases. The authorization for joint petitions and joint adjudications when a partnership is one of the bankrupts is not retained in these rules, since the provisions therefor in subdivisions a and b of § 5 of the Act have been more confusing than helpful. Joint administration, on the other hand has, manifest advantages which ought not to be restricted to cases involving partnerships and partners. The election or appointment of one trustee for 2 or more jointly administered estates is authorized by Rule

210. The authority of the court to order join. administration under subdivision (b) of this rule extends equally to the situation where the petitions are filed under different rules, *e.g.*, where one petition is voluntary and the other involuntary, and to that where all of the petitions are filed under the same rule.

Consolidation of cases implies a unitary administration of the estate and will ordinarily be indicated under the circumstances to which subdivision (a) applies. This rule does not deal with the consolidation of cases involving 2 or more separate bankrupts. Although consolidation of the estates of separate bankrupts may sometimes be appropriate, as when the affairs of an individual and a corporation owned or controlled by him are so intermingled that the court cannot separate their assets and liabilities, such consolidation, as distinguished from joint administration, is ~~not~~ authorized by this rule since the propriety of consolidation depends on substantive considerations and affects the substantive rights of the creditors of the different estates. For an illustration of the substantive consolidation of separate estates, see *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215 (1941).

neither

nor prohibited

See also Chemical Bank N.Y. Trust Co. v. Kheel, 369 F.2d 845 (2d Cir. 1966); Seligson & Mandell, Multi-Debtor Petition - Consolidation of Debtors and Due Process of Law, 73 Com.L.J. 341 (1968); Kennedy, Insolvency and the Corporate Veil in the United States in Proceedings of the 8th International Symposium on Comparative Law 232, 248-55 (1971).

Joint administration as distinguished from consolidation may include combining the estates to the extent that a single docket may be used for the matters occurring in the administration, including the listing of filed claims, the combining of notices to creditors of the different estates, and other purely administrative matters that may aid in expediting the cases and rendering the process less costly.

Subdivision (c) is an adaptation of the provisions of Rule 42(a) of the Federal Rules of Civil Procedure for the purposes of administration of estates under this rule. The rule does not deal with filing fees when an order for the consolidation of cases or joint administration of estates is made. *Cf.* Rule 107.

Rule 118. Death or Insanity of Bankrupt

The death or insanity of the bankrupt shall not abate a bankruptcy case. In such event the estate of the bankrupt shall be administered and the case concluded in the same manner, so far as possible, as though the death or insanity had not occurred.

ADVISORY COMMITTEE'S NOTE

This rule is an adaptation of § 8 of the Act. The proviso of this section is incorporated into Rule 103(f).

Bankrupt Involved in Foreign Proceeding

Rule 119. ~~Dismissal or Suspension of Case of Bankrupt Adjudged in a Foreign Jurisdiction~~

When a proceeding for the purpose of the liquidation or rehabilitation of his estate has been commenced by or against a bankrupt in a court of competent jurisdiction without the United States,

~~When a bankrupt has been adjudged bankrupt by a court of competent jurisdiction without the United States,~~ the court of bankruptcy may, after hearing on notice to the petitioner or petitioners and such other persons as it may direct, having regard to the rights and convenience of local creditors and other relevant circumstances, dismiss a case or suspend the proceedings therein under such terms as may be appropriate.

ADVISORY COMMITTEE'S NOTE

Cf. Nadelmann, The National Bankruptcy Act and the Conflict of Laws, 59 Harv.L.Rev. 1025, 1041-46 (1946).

This rule is derived from § 2a(22) of the Act. Proceedings suspended pursuant to this rule may be reinstated after hearing on notice or as provided in the order suspending the proceedings. *Cf.* Note, *Consequences of Abstention by a Federal Court*, 73 Harv.L.Rev. 1358 (1960). Since the merits will rarely have been considered by the court in ordering a dismissal under this rule, such a dismissal is ordinarily without prejudice when the court includes no provision to the contrary in its order. Rule 120(c).

Rule 120. Dismissal of Case Without Determination of Merits

(a) Voluntary Dismissal; Dismissal for Want of Prosecution. A case shall not be dismissed ~~upon~~ application or motion of the petitioner or petitioners or for want of prosecution or by consent of the parties until after hearing upon notice to the creditors as

provided in Rule 203(a). To enable the court to give such notice, the bankrupt, if he has not already done so, shall file a list of all his creditors with their addresses. If the bankrupt fails to file such list, ~~within the time fixed~~, the court may order ~~the list to be prepared and filed by the trustee, receiver, a petitioning creditor, or other party in interest.~~

(b) Dismissal for Failure to Pay Filing Fees.

(1) ~~Upon~~ nonpayment of any installment of the filing fees as ordered ~~under~~ Bankruptcy Rule 107(b) and after hearing ~~upon~~ notice to the bankrupt, the court may dismiss the case.

(2) If a case is dismissed or closed without the payment in full of the filing fees, the installments collected shall be distributed in the same manner and proportions as if the filing fees had been paid in full.

(3) Notice of dismissal for failure to pay the filing fees shall be given within 30 days after the dismissal to creditors appearing on the list of creditors and to those who have filed claims, ~~and to the district director of internal revenue~~ in the manner provided in Rule 203.

(c) Effect of Dismissal. Unless the order specifies to the contrary, dismissal of a case otherwise than on the merits is without prejudice.

within the time fixed by the court,

by

provide for the preparation and filing of the list in such manner as may be appropriate.

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ADVISORY COMMITTEE'S NOTE

Subdivision (a) of this rule is an adaptation of § 59g of the Act. While this rule, like § 59g, applies to a case

commenced by a voluntary or an involuntary petition, the "consent of the parties" referred to in the first sentence of the rule is that of the petitioning creditors and the bankrupt in an involuntary proceeding. The last sentence of the subdivision, like Rule 108, recognizes that the court should not be confined to the petitioning creditors in its choice of parties on whom to call for assistance in preparing the list of creditors when the bankrupt has defaulted in the performance of his duty to provide such a list. Since these rules do not contemplate a dismissal for failure to pay costs except as provided in subdivision (b), the proviso of § 59g of the Act referring to such a dismissal is not retained in the rules.

Subdivision (b) is derived from General Order 35(4)(b). A dismissal under this subdivision can occur only when the petition has been permitted to be filed pursuant to Rule 107(b). The provision in paragraph (3) for notice of the dismissal is correlated with the provision in Rule 408 for notice to creditors when there is a waiver, denial, or revocation of a discharge. As pointed out in the Note accompanying Rule 408, the purpose of notifying creditors of a bankrupt that no discharge has been granted is to correct their assumption to the contrary so that they can take whatever steps to protect their claims appear to be appropriate in the light of such information.

Subdivision (c) is new. Dismissal of a bankruptcy case for a reason comprehended by this rule, and especially for failure to pay filing fees, has often operated harshly against the bankrupt. See, *e.g.*, *In re Frey*, 95 F.Supp. 1007 (S.D.N.Y. 1951); MacLachlan, *Bankruptcy* 100 (1956); Shaeffer, *Proceedings in Bankruptcy in Forma Pauperis*, 69 Col. L.Rev. 1203, 1204 (1969). Typically he has ~~had~~ been held thereafter barred from obtaining a discharge on the debts which could have been discharged in the case that was dismissed. *In re Seiden*, 174 F.2d 586, 587 (2d Cir. 1949); *Perlman v. 322 West Seventy-Second Street Co.*, 127 F.2d 716 (2d Cir. 1942). Although the court of bankruptcy has undoubtedly had discretion under Rule 41(b) of the Federal Rules of Civil Procedure to indicate that an involuntary dismissal was without prejudice to future relief under the Act, see Donnelly,

The Non-Dischargeability of Dischargeable Debts in Bankruptcy, 36 Va.L.Rev. 185, 191 (1950), "the reported cases reveal no instance of a bankrupt escaping the res judicata effect of a dismissal because the dismissing court had so exercised its discretion." Countryman, *Cases and Materials on Debtor and Creditor* 792 (1964). Subdivision (c) leaves discretion in the court to determine in the light of the circumstances whether dismissal of a bankruptcy case otherwise than on the merits should bar future relief under the Act, but when it makes no specific reference one way or the other in the order, a dismissal not on the merits is without prejudice. Under § 17b of the Act, added by the amendment of 1970, a failure to obtain a discharge in a prior proceeding dismissed without prejudice for failure to pay filing fees or to secure costs does not bar a discharge in a subsequent bankruptcy.

Rule 121. Applicability of Rules in Part VII

Except as otherwise provided in ~~the~~ Part I of these rules ~~in Part I~~ and unless the court otherwise directs, the following rules in Part VII apply in all proceedings relating to a contested petition and in all proceedings to vacate an adjudication: Rules 705, 708–710, 715, 716, 724–726, 728–737, 744.1, 752, 756, and 762. The court may direct that one or more of the other rules in Part VII shall also apply in such a proceeding. For the purposes of this rule a reference in the rules in Part VII to adversary proceedings shall be read as a reference to proceedings relating to a contested petition or proceedings to vacate an adjudication, and a reference in the Federal Rules of Civil Procedure to the complaint shall be read as a reference to the petition.

ADVISORY COMMITTEE'S NOTE

The rules in Part VII to which this rule refers are adaptations of the Federal Rules of Civil Procedure for the purpose of governing the procedure in adversary proceedings in bankruptcy cases. See the Note accompanying Rule 701 *infra*. Because of the special need for dispatch and expedition in the determination of the question of adjudication, see *Acme Harvester Co. v. Beekman Lbr. Co.*, 222 U.S. 300, 309 (1911), the objective of some of the Rules of Civil Procedure and their adaptations in Part VII to facilitate the settlement of multiple controversies involving many persons in a single lawsuit is not compatible with the exigencies of bankruptcy administration. See *United States F. & G. Co. v. Bray*, 225 U.S. 205, 218 (1912). For that reason such rules as 713, 714, and 718–723 would be rarely if ever appropriate for application in a proceeding on a contested petition.

Certain terms used in the Federal Rules of Civil Procedure have altered meanings when they are made applicable in bankruptcy cases by these rules. See Rule 902 *infra*. This Rule 121 requires that the terms "adversary proceedings" when used in the rules in Part VII and "complaint" when used in the Federal Rules of Civil Procedure be given altered meanings when they are made applicable to proceedings relating to a contested petition or proceedings to vacate any adjudication. A motion to vacate an adjudication, whether or not made on a petition that was or could have been contested, is governed by the rules in Part VII referred to in this Rule 121.

Rule 122

Conversion of a Chapter Case to Bankruptcy

When an order is entered in a Chapter X, XI, XII, or XIII case directing that the case continue as a bankruptcy case, the procedure shall be as follows:

(1) In all respects other than as provided in the following paragraphs, the case shall be deemed to have been commenced as of the date of the filing of the first petition initiating a case under the Act and shall be conducted as far as possible as if no petition commencing a chapter case had been filed.

(2) Unless otherwise directed by the court, lists, inventories, schedules, and statements filed in the superseded case shall be deemed to be the schedules and statement of affairs filed in the bankruptcy case pursuant to Rules 108 and 403(4) and in full compliance therewith; but if no such documents have been previously filed, the bankrupt shall comply with Rule 108 as if he had been adjudicated an involuntary bankrupt on the date of the entry of the order directing that the case continue as a bankruptcy case.

(3) Notice of the order directing that the case continue as a bankruptcy case shall be given to all creditors in the manner provided by Rule 203 within 20 days after entry of the order and shall accompany the notice of the first meeting of creditors if one is held. If no first meeting of creditors is held, the date of the mailing of the notice of the order as provided in this paragraph shall be deemed the first date set

for the first meeting of creditors for the purposes of Rules 302(e), 404(a), and 409(a)(2); but if the time for filing claims, a complaint objecting to discharge, or a complaint to obtain a determination of the dischargeability of any debt had expired in a pending bankruptcy case prior to the filing therein of a chapter petition, the preceding clause of this paragraph shall not be deemed to revive or extend such time.

(4) A trustee shall be appointed by the court and notified pursuant to Rule 209(c), and shall qualify pursuant to Rule 212, unless

(A) a trustee has been previously selected pursuant to Rule 209 and has qualified, in which event he shall be immediately notified of the order directing that the case continue as a bankruptcy case and shall enter upon the performance of his duties without further qualification; or

(B) a standby trustee has been nominated in the superseded case, in which event he shall be immediately notified pursuant to Rule 209(c) and, within 5 days after receipt of notice, shall qualify in the manner provided by Rule 212; or

(C) the court pursuant to Rule 211 orders that no trustee be appointed.

If a trustee notified under this paragraph fails to qualify or to enter upon the performance of his duties, the court shall appoint a trustee pursuant to Rule 209.

(5) All claims filed in the superseded case shall be deemed filed in the bankruptcy case.

(6) Forthwith after qualification of the trustee or entry by him on the performance of his duties as provided in paragraph (4) of this rule, any trustee, receiver, or debtor in possession previously acting in the chapter case shall, unless otherwise ordered, turn over to the trustee in bankruptcy all the records and property of the estate in his possession or subject to his control.

(7) Each trustee, receiver, and debtor in possession acting in the superseded chapter case shall, unless the court otherwise directs, file with the court a final report and account within 30 days after the entry of the order directing that the case continue as a bankruptcy case, including, in a superseded Chapter X, XI, or XII case, a separate schedule listing unpaid debts incurred by him after the commencement of the chapter case. If the order is entered after confirmation of a plan, the debtor shall file with the court schedules of (A) property not listed in the final report filed pursuant to the preceding sentence of this paragraph and acquired by him after the filing of the original petition under the Act and before the entry of the order directing that the case continue as a bankruptcy case and (B) debts not listed in the final report filed pursuant to the preceding sentence of this paragraph and incurred by him after confirmation and before the entry of such order.

(8) On the filing of a schedule required by the preceding

paragraph, the court shall enter an order directing the claims so scheduled, including claims of the United States, any state, and any subdivision thereof, to be filed and shall give notice by mail to the holders thereof to file their claims pursuant to Rules 301 and 302(a)-(d) within 60 days from the entry of the order directing them to be filed, except that claims not scheduled as provided in the preceding paragraph and claims arising from rejection of executory contracts under paragraph (10) of this rule may be filed within such further time as the court may direct.

(9) If the court grants an extension of time for the filing of claims pursuant to Rule 302(e)(5), the extension shall apply to holders of claims who failed to file within the time prescribed by, or fixed by the court pursuant to, paragraph (8) of this rule, and notice shall be given them in the manner provided in Rule 203(a).

(10) Rule 607 shall govern the assumption, rejection, and assignment of contracts entered into or assumed by a trustee, receiver, or debtor in possession acting in the superseded chapter case which are executory in whole or in part at the time of the entry of the order directing the case to continue as a bankruptcy case, except that with respect to a trustee selected as provided in paragraph (4)(A) of this rule the time periods prescribed by Rule 607 shall begin to run from the entry of such order.

ADVISORY COMMITTEE'S NOTE

This rule is derived from §§ 238, 261, 338, 378, 381, 391, 483, 486, 516, 643, 667, ~~and~~ 669, and 676 of the Act. The rule applies to proceedings in a bankruptcy case following supersession of a case commenced under Chapter X, XI, XII, or XIII, whether the latter was initiated by an original petition or by a petition filed in a pending bankruptcy or another chapter case. The case may have originated as a bankruptcy case in which a petition commencing a chapter case was filed but in which an order was entered directing the resumption of the bankruptcy case. There may have been more than one aborted chapter case, e.g., a Chapter XI case, converted to a Chapter X case, in which was entered the order directing the case to continue in bankruptcy. The rule is not intended to invalidate any action taken in the superseded case before its conversion to bankruptcy.

If requirements applicable in the superseded case respecting the filing of schedules of debt and property, or lists of creditors and inventory, and of statements and executory contracts have been complied with before the order directing conversion to bankruptcy, these documents will ordinarily provide all the information about the debts, property, financial affairs, and contracts of the bankrupt needed for the administration of the estate in bankruptcy. If the information submitted in the superseded case is inadequate for the purposes of bankruptcy administration, however, the court may direct the preparation of further informational material and the manner and time of its submission pursuant to paragraph (2). If no schedules, lists, inventories, or statements were filed in the superseded case, this paragraph imposes the duty on the bankrupt to file schedules and a statement of affairs pursuant to Rule 108 as if he had been adjudicated an involuntary bankrupt on the date when the court directed the continuation of the case as a bankruptcy case.

Paragraphs (4) and (6) contemplate that typically, after the court orders conversion of a chapter case to bankruptcy, a trustee in bankruptcy will forthwith take charge of the property of the estate and proceed expeditiously to liquidate it. If no trustee has previously qualified and no standby trustee selected in the chapter case is awaiting notification of an order of conversion, the court will appoint a trustee. The procedure so prescribed follows that established by the 1967 amendment of § 378 of the Act for a bankruptcy that supersedes a Chapter XI case. See 8 Collier ¶5.49[14](1968); 9 id. ¶10.11(1968). Paragraph (4) of this rule eliminates the hiatus that would otherwise occur in the control and supervision of the estate on the entry of an order of conversion to bankruptcy in a case where no trustee previously selected pursuant to Rule 209 has qualified and no standby trustee has been nominated in the superseded chapter case.

Paragraphs (7), (8), (9), and (10) of the rule embody the substance of amendments of provisions in Chapters X, XI, and XII that were enacted in 1967 to improve the administration of estates in superseding bankruptcies. The procedures prescribed by this legislation are extended by this rule to the extent they are appropriate to bankruptcies that supersede Chapter XIII cases. The provision in the last sentence of §§ 238b, 378b, and 483b of the Act to the effect that rejection in the bankruptcy case of a contract entered into or assumed in a superseded chapter case creates a cost of administration of the superseded case prescribes a rule of priority inappropriate for inclusion in this rule.

PART II. OFFICERS FOR ADMINISTERING THE ESTATE; NOTICES TO CREDITORS; CREDITORS' MEETINGS; EXAMINATIONS; ELECTIONS; ATTORNEYS AND ACCOUNTANTS

Rule 201. Appointment and Duties of Receivers

(a) Purposes and Term of Receivership. Subject to the provisions of this rule, the court may appoint a receiver when necessary in the best ~~interests~~ interest of the estate (1) to take charge of the property of a bankrupt; (2) to conduct the business of the bankrupt; or (3) to afford representation to the estate in an action, adversary proceeding, or ~~a~~ contested matter when no trustee has qualified or the interest of the trustee may be adverse to that of the estate. Such appointment shall be terminated when the trustee qualifies or there is no further need for a receiver, and the authorization to conduct the business of the bankrupt after adjudication shall continue only for such time as may be in the best ~~interests~~ interest of the estate and consistent with orderly liquidation.

(b) Application for Appointment. An application for appointment of a receiver shall state the specific facts showing the necessity for the appointment.

(c) Appointment Before Adjudication. Before adjudication, appointment of a receiver may be made only upon application. ~~Such~~ The ap-

plication may be granted only after hearing upon notice to the bankrupt and ~~any~~ other parties in interest ~~designated by~~ the court, except that a receiver may be appointed without notice if irreparable loss to the estate may otherwise result. An application for appointment of a receiver without notice and any order of appointment made without notice shall state what loss may result and why it would be irreparable.

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(d) Bond of Applicant. Before adjudication, no receiver may be appointed unless the applicant furnishes a bond in such amount and with such surety as the court shall approve, conditioned to indemnify the bankrupt for the costs, counsel fees, expenses, and damages occasioned by the appointment and action of the receiver in the event the petition is dismissed or withdrawn. The property of the bankrupt shall be released, however, if he files a counter-bond in such amount and with such surety as the court shall approve, conditioned that the bankrupt account for and turn over such property or pay to the trustee the value thereof in money at the time of release, in the event the adjudication is made.

(e)Appointment After Adjudication. After adjudication the court may appoint a receiver on application or on its own initiative. Such appointment shall be made only after notice to such persons as the court may designate, unless it clearly appears that notice is impracticable or unnecessary.

(f) Eligibility. ~~Any~~ person who is eligible

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to be trustee may be appointed receiver.

under Rule 209(d)

(g) Order of Appointment. An order appointing a receiver shall state why the appointment is necessary. A receiver is a mere custodian unless, upon proper cause shown, his duties are enlarged or otherwise specified by order of court. A copy of every order appointing a receiver shall forthwith be delivered to the bankrupt, or mailed to him at his last known address, and to such other persons as the court may designate.

The court shall immediately notify the receiver of his appointment, inform him as to how he may qualify, and require him forthwith to notify the court of his acceptance or rejection of the office.

Notice of Appointment;

(h) Qualification. A receiver shall qualify by filing a bond in accordance with Rule 212.

as provided in

(i) Duties. A receiver shall perform the duties prescribed in Rule 218 to the extent it is appropriate, except as the court may otherwise direct. Forthwith after qualification of the trustee, the receiver shall, unless otherwise ordered, turn over to the trustee all the records and property of the estate in his possession or subject to his control as receiver. The receiver shall file his final report and account within 30 days after qualification of the trustee unless the court otherwise directs.

ADVISORY COMMITTEE'S NOTE

Subdivision (a) of Rule 201 is derived from § 2a(3) and (5) of the Act but adds, in clause (3), a provision for appointment of a receiver when the interest of the trustee may be adverse to that of the estate. Such a situation may arise for example in a proceeding to remove the trustee under Rule 221(a). The subdivision also accommodates the appointment of a receiver to represent the estate when no trustee is appointed (see Rule 211) and a need arises in the course of administration for appoint-

The appointment of the receiver ordinarily terminates automatically on the qualification of the trustee.

ment of a temporary or ad hoc representative of the estate rather than a trustee (or a new trustee) with all the duties and compensation that appertain to that officer. For a reference to such a situation, see Rule 403(d). *Cf. Bartle v. Markson*, 357 F.2d 517, 524 (2d Cir. 1966) (appointment of trustee authorized in reopened Chapter XI case "for the limited purpose of insuring effective prosecution of creditors' claims"). The requirement of the last clause of the subdivision that the receiver's continuation of the bankrupt's business be consistent with orderly liquidation is correlated with a similar limitation imposed on the trustee in Rule 216.

Subdivisions (b), (c), (e), and (g). Subdivisions (b), (c), and (e), and the first and third sentences of subdivision (g) are new. The policy expressed in § 2a(3) of authorizing appointment of receivers only in cases of necessity is preserved and reinforced by the provisions in subdivisions (b) and (g) of the rule requiring the application for a receiver and the order of appointment to state why the appointment is necessary. The theme of General Order 40 to restrict receivership expense, by presuming the receiver's duties and compensation to be those of a mere custodian in the absence of explicit enlargement by court order, is retained in the second sentence of subdivision (g).

Subdivisions (c) and (e) differentiate between appointment of a receiver before adjudication and one made afterward in recognition of the fact that prior to adjudication the divestment of the bankrupt's title to his property has not yet been legally established. The restriction of subdivision (c) against appointment of a receiver before adjudication without notice unless irreparable loss would otherwise result to the estate codifies a limitation applied by the courts under § 2a(3) of the Act. See *In re Press Printers & Publishers, Inc.*, 12 F.2d 660, 661 (3d Cir. 1926), cert.denied, 276 U.S. 633 (1928); 1 Collier ¶ 2.26 (1968). Appointment of a receiver without prior notice is made the exception after as well as before adjudication, and subdivision (g) provides for prompt notice to the bankrupt of any appointment of a receiver after it has been made. Subdivision (e) recognizes that

after adjudication the court may appoint a receiver without waiting for an application and in exceptional circumstances may do so without giving notice. The authority of a referee under the Act to appoint a receiver on his own motion, even where the alternative appears to be loss to the estate, has been a matter of debate. See *Proceedings of Seminar for Newly Appointed Referees in Bankruptcy* 120–21 (1964). *Cf.* E.D.Va.Bankr.Rule 13 (a).

Subdivision (d) is derived from § 69a of the Act and includes clarifying language from Official Form No. 8. Rule 925 applies to any proceeding to enforce liability on a bond given pursuant to this subdivision.

Subdivision (f) follows § 45 of the Act in assimilating eligibility requirements for receivers to those for trustees. The requirements for trustees are set out in Rule 209(d).

Subdivision (h). Rule 212, to which subdivision (h) refers, incorporates the requirements respecting a receiver's bond set out in § 50b and h of the Act.

with modifications

The notice to the receiver should inform him of the penal sum of his bond, if required, or of whatever other mode of qualification is prescribed by the court pursuant to Rule 212.

Subdivision (i) is new but is substantially a restatement of sound practice as recognized in the cases and local rules. See 1 Collier ¶ 2.31 (1968); 11 *id.* § 6.003 (1968). The last sentence is an adaptation of Bankruptcy Rule 8(f) of the Southern and Eastern Districts of New York. As the last clause recognizes, the rule does not preclude a local rule or court order requiring an earlier report and account by a receiver—*e.g.*, at the first meeting of creditors. See, *e.g.*, D.Minn. Bankr.R. 8(j).

Rule 202. Appointment of Marshal in Lieu of Receiver; His Duties

The court may appoint a marshal in lieu of a receiver and, in such event, the provisions of Rule 201 except subdivisions (f) and (h) shall apply.

ADVISORY COMMITTEE'S NOTE

This rule derives from provisions in §§ 2a(3) and (5) of the Act and General Order 40. The reference in the rule, as in the Act, is to the United States marshal.

Rule 203. Notices to Creditors and ~~District Director of Internal Revenue~~ the United States

(a) Ten-Day Notices to All Creditors. Except as provided hereinafter, the court shall give all creditors at least 10 days' notice by mail of (1) a meeting of creditors; (2) any proposed sale of property, including the time and place of any public sale, unless the court upon cause shown shortens the time or orders a sale without notice; (3) the hearing on the approval of a compromise or settlement of a controversy, unless the court upon cause shown directs that notice not be sent; ~~(4) the hearing on the trustee's application to abandon property unless the court directs that notice not be sent;~~ 4 (~~5~~) the date fixed for the filing of claims against a surplus in an estate as provided in Rule 302(e)(5); 5 (~~6~~) the hearing on the dismissal of a case when notice is required by Rule 120(a); and 6 (~~7~~) the hearing on approval of a trustee's or a receiver's account and on an application for compensation or reimbursement of expenses filed by a receiver, marshal, trustee, attorney, or accountant, except when no final meeting of creditors is required to be ordered ~~under~~ pursuant to Rule 204(c). The notice of a proposed sale of property, including real estate, is sufficient if it generally describes the property to be sold. The notice of a hearing on an application for compensa-

tion shall specify the applicant and the amount requested.

(b) Notice of No Dividend. If it appears from the schedules that there are no assets from which a dividend can be paid, the court may include in the notice of the first meeting a statement to that effect, that it is unnecessary to file claims, and that if sufficient assets become available for the payment of a dividend, the court will give further notice of the opportunity to file claims and the time allowed therefor.

(c) Other Notices to All Creditors. The court shall give notice to creditors of (1) the dismissal of a case for failure to pay filing fees ~~under~~ Rule 120(b), (2) the time allowed for filing claims after notice of no dividend ~~under Rule 302(e)(4)~~; (3) the time fixed for filing a complaint objecting to the bankrupt's discharge ~~under~~ Rule 404(b); (4) the waiver, denial, or revocation of a discharge under Rule 408; and (~~5~~) the time allowed for filing a complaint to determine the dischargeability of a debt pursuant to § 17c(2) of the Act ~~under~~ Rule 409(a)(2).

(d) Notices to Creditors Whose Claims ~~are~~ Filed. After 6 months following the first date set for the first meeting of creditors, the court may direct that all notices required by subdivision (a) of this rule, except clause (~~5~~) thereof, be mailed only to creditors whose claims have been filed and creditors, if any, who are still permitted to file claims by reason of an extension granted under Rule 302(e).

or reimbursement of expenses

(2) the entry of an order directing that a chapter case continue as a bankruptcy case as provided in Rule 122(4);

by mail

all

the

pursuant to

3

issuance of a

pursuant to Rule 302(e)(4)

4

6

pursuant to

(5) the order of discharge as provided in Rule 404(a);

7

as provided in

Are

4

(e) Addresses of Notices ~~to Creditors~~. All notices to which a creditor is entitled under these rules shall be addressed to the creditor as he or his duly authorized agent may direct in a request filed with the court; otherwise, to the creditor at the address shown in the schedules or, if a different address is stated in a proof of claim duly filed, then at the address so stated.

(f) Notices to Creditors' Committee. Notwithstanding the foregoing subdivisions, if a creditors' committee has been elected, the court may order that notices required by clauses (2), (3), ~~(4),~~ and ~~(7)~~ 6 of subdivision (a) be mailed only to the committee or to its ~~duly~~ authorized agent and to the creditors who file with the court a request that all notices under these clauses be mailed to them.

(g) Notices to the United States. Copies of ~~all~~ notices required to be mailed to creditors all under ~~subdivisions (a), (b), and (c) of this rule~~ these rules shall be mailed (1) to the district director of internal revenue for the district in which the case is pending and (2) whenever the schedules, the list of creditors, or any other paper filed in the case discloses a debt to the United States other than one for taxes, to the United States attorney for the district in which the case is pending and, if disclosed by the filed papers, to the department, agency, or instrumentality of the United States through which the bankrupt became so indebted.

(h) Notice by Publication. If the court finds that it is impracticable to give notice to

creditors by mail as provided in this rule or that it is desirable to supplement such notice, the court may order publication thereof.

(i) Caption. The caption of every notice given under this rule shall comply with Rule 106 and shall include all names used by the bankrupt within 6 years before the filing of the petition, as disclosed on the ~~petition pursuant to Rule 106 and the~~ statement of affairs filed pursuant to Rule 108.

also

ADVISORY COMMITTEE'S NOTE

This rule collects the provisions for notices specifically applicable to creditors in bankruptcy cases, but reference must be made to other rules for the time and ~~manner in which~~ the notices ~~required by~~ subdivision (c) ~~shall be given~~. The grant of general authority to the court to regulate notices in Rule 907 supplements but is subject to the specific provisions of Rule 203 and any other rules prescribing the terms of notice.

listed in

certain other requirements respecting

Since notice by mail is complete on mailing, the

Subdivision (a) essentially restates the requirement of § 58a of the Act that all creditors get 10-day notices by mail of the significant events in a bankruptcy case. ~~The~~ requirement of this subdivision is satisfied if the notices it prescribes are deposited in the mail at least 10 days before the event ~~of which notice is to be given, even though the creditors receive the notice within the 10 day period. See 3 Collier 491 (1964). *Cf.* Fed.R.Civ.P. 5(b); Fed.R.App.P. 25(c).~~ The time limits prescribed by subdivision (a) cannot be reduced except to the extent and under the conditions stated in this rule. *Cf.* Rule 906(c) *infra*. The exceptions referred to by the introductory phrase of ~~this~~ subdivision (a) include ~~the provisions for notice of dismissal for failure to pay filing fees and for notices in proceedings involving discharge that are referred to in subdivision (c), and~~ the modifications in the notice procedure permitted by subdivision (d) as to nonfiling creditors after the time for filing claims has ex-

See Rule 906(e); 3 Collier 494 (1971).

pired, by subdivision (f) as to creditors who have elected a committee to represent them, and by subdivision (h) when compliance with subdivision (a) is impracticable.

The provision in § 58a(1) of the Act for notice of examinations of the bankrupt is deleted as unnecessary. As provided in Rules 204(a)(2) and 205(b), the examination of the bankrupt is ordinarily conducted at the first meeting of creditors, notice of which is required by subdivision (a) of this rule. If an examination is conducted at any other time pursuant to Rule 205(a), the court may give notice to some or all creditors pursuant to Rule 907. Notice to creditors of examinations of the bankrupt was made discretionary in 1938 in recognition of the fact that such notice is often not feasible. See 3 Collier ¶ 58.01 n.11, ¶ 58.06 (1964).

The notice of a proposed sale carried over from § 58a(4) of the Act to clause (2) of this rule affords the creditors an opportunity to express their views as to whether the sale should be public or private, in bulk or by parcels, etc. The notice to creditors of a proposed sale of property is required to specify its time and place in order to enable the creditors to protect their interests by attending the sale or sending a representative. Protection of creditor interests does not, however, require the notice to contain a legal description of real estate or other property to be sold. See *In re Nevada-Utah Mines & Smelters Corp.*, 202 Fed. 126, 129 (2d Cir. 1913); *In re Park Distributors, Inc.*, 176 F.Supp. 38, 41 (S.D.Cal. 1959).

~~The provision in clause (4) for notice of a hearing on an application to abandon property is new. Complete administration of an estate requires an ordered disposition by the court of all of the bankrupt's property, and failure of the court to authorize abandonment of worthless and burdensome assets has often engendered unnecessary litigation after the closing of a bankruptcy case. See 4A Collier ¶ 70.42[3] n.9a (1967). The interest of the creditors in maximizing the realization from the estate generally warrants giving notice to them of proceedings to determine whether particular property should be abandoned. See *Faherty v. E. Kahn's Sons Co.*, 75 F.2d~~

If a meeting of creditors is adjourned before its conclusion, no notice of the adjourned date is required to be given to creditors under this rule. Treatment of the adjournment as a continuance of the meeting conforms to established and approved practice under the Act.
3 Collier 11-12 (1964).

~~110, 114 (5th Cir. 1935); *Felty v. Owen*, 284 Ky. 762, 765, 145 S.W.2d 1059, 1060 (1940); 4A Collier, *supra* at 507 n.9, 518 n.15. The court should nevertheless retain discretion to dispense with such notice in appropriate cases in the interest of minimizing administrative expense.~~

4 The provision in clause ~~(5)~~ for notifying creditors of a deadline fixed pursuant to Rule 302(e)(5) is also new. A notice to all creditors of the fixing of a new date for filing claims when a surplus remains in the estate is necessary if the opportunity to share therein afforded late filers by § 57 of the Act is to be meaningful and the distribution is to be fair. See *In re Searles*, 166 F.2d 475, 477–78 (2d Cir. 1948) (Frank, J., dissenting). Subdivision (d) recognizes that nonfilers and late filers must get the notice prescribed by clause ~~(5)~~ of subdivision (a).

4 The hearing on a trustee's account or an application for compensation or reimbursement of expenses filed under Rule 219 is typically held at the final meeting of creditors. Rule 204(c) excuses the calling of a final creditors' meeting when the net realization for the estate does not exceed $250, and the exception to the notice requirements of clause (7) is correlated with the dispensation respecting the final meeting.

Subdivision (b), authorizing a notice of the apparent insufficiency of assets for the payment of any dividend, to be given in conjunction with the notice of the first meeting of creditors, is correlated with Rule 302(e)(1), which provides for the issuance of an additional notice to creditors if the possibility of a payment of a dividend later materializes.

Subdivision (d). After the time for filing claims has expired, creditors who have not filed their claims in accordance with Rule 302 are not entitled to share in the estate except as they may come within the special provisions of Rule 302(e)(1)–(5). Subdivision (d) takes account of the fact that eliminating notice to creditors who have no recognized stake in the estate may permit economies in time and expense. Reduction of the list of creditors to receive notices under this subdivision is discretionary. This subdivision does not of course apply to the notice of the first meeting of creditors.

Subdivision (e) recognizes that an agent authorized to receive notices for a creditor may, without a court order, designate how notices to the creditor he represents should be addressed. Such an agent includes an officer of a corporation, an attorney at law, or an attorney in fact if the requisite authority has been given him. It should be noted that Official Forms No. 13 and No. 14 do not include an authorization of the holder of a power of attorney to receive notices for the creditor, but neither these forms nor this rule carries any implication that such an authorization may not be given in a power of attorney or that a request for notices to be addressed to both the creditor and his duly authorized agent may not be filed.

Subdivision (f) is an adaptation of the proviso at the end of § 58a. It enlarges the list of matters of which notice may be given a creditors' committee in lieu of notice to the creditors to include hearings on approval of the trustee's or receiver's account, on applications for compensation, and on applications to abandon property. Such notice may serve every practical purpose of a notice to all the creditors and save delay and expense. *In re Schulte-United, Inc.*, 59 F.2d 553, 561 (8th Cir. 1932).

Subdivision (g) is a revision of § 58e of the Act. The premise of the requirement that the district director of internal revenue receive ~~all~~ notices that creditors receive ~~under subdivisions (a), (b), and (c)~~ is that every bankrupt is at least potentially a tax debtor of the United States. Notice to the district director alerts him to the possibility that a tax debtor's estate is about to be liquidated and that he may be discharged in bankruptcy. Where other indebtedness to the Federal Government is indicated ~~in the schedule~~, the United States district attorney is notified in every case as the person in the best position to see to it that the interests of the government are protected. In addition, the provision in the last sentence of § 58e requiring notice by mail to the head of any department, agency, or instrumentality of the United States through whose action the bankrupt became indebted to the United States is carried into this subdivision of the rule. This rule is not intended to preclude a local rule from requiring a state or local tax authority to receive

copies of

all

some or all of the notices creditors are entitled to receive under subdivisions (a), (b), and (c).

Subdivision (h) specifies two kinds of situations in which notice by publication may be appropriate: (1) when notice by mail is impracticable; and (2) when notice by mail alone is less than adequate. Notice by mail may be impracticable when, for example, the bankrupt has disappeared or his records have been destroyed and the names and addresses of his creditors are unavailable, or when the number of creditors with nominal claims is very large and the estate to be distributed may be insufficient to defray the costs of issuing the notices. Supplementation of notice by mail is indicated when the bankrupt's records are incomplete or inaccurate and it is reasonable to believe that publication may reach some of the creditors who would otherwise be missed. Rule 908 applies when the court directs notice by publication under this rule. Neither clause (2) of subdivision (a) nor subdivision (g) of this rule is concerned with the publication of advertisement to the general public of a sale of property of the estate at public auction under Rule 606(b). See 3 Collier 500–01 (1964), 4A *id.* 1165–67 (1967).

Subdivision (i). As noted in connection with Rule 106, the disclosure requirement in subdivision (i) of this rule follows the practice established in some districts by local rule. Inclusion in notices to creditors of information as to other names used by the bankrupt will assist them in the preparation of their proofs of claim and in deciding whether to file a complaint objecting to the bankrupt's discharge. The mailing of notices should not be postponed to await a delayed filing of the statement of affairs.

While the other names used by the bankrupt and required to be disclosed will ordinarily be included in the caption pursuant to Rule 106, there may be additional names listed by the bankrupt on his statement of affairs when he did not file the petition.

Disposition of provisions of § 58c of Act. The provisions of § 58c of the Act, requiring notices to be given by the referee unless otherwise ordered by the judge and authorizing written waiver of any notice required by the Act, have been omitted from the Rule as unnecessary. The duty to give notice to the creditors under this rule and under Rules 404 and 408 is imposed on the court. This duty may be delegated to an assistant or an em-

ployee in the clerk's office as provided in Rule 506. Rule 907 authorizes the court to prescribe the manner in which any other notice is to be given under the rules. These rules pose no obstacle to the court's giving notice by mail deposited at the location of a national or regional computer center on the basis of information supplied the center by the court. Waiver of notice may be by conduct as well as in writing, and its effect may be appropriately left to case law. See, *e.g.*, *Connelly v. Hancock, Dorr, Ryan & Shove*, 195 F.2d 864, 868–69 (2d Cir. 1952); *In re Purrier*, 73 F.Supp. 418, 420 (W.D.Wash. 1947).

Rule 204. Meetings of Creditors

(a) First Meeting.

(1) Date and Place. The first meeting of creditors shall be held not less than 10 nor more than 30 days after the adjudication, but if there is an appeal from, or a motion to vacate, the adjudication, or if there is a motion to dismiss the case, the court may ~~postpone the~~ delay fixing a date for such meeting. The meeting may be held at a regular place for holding court or at any other place within the district more convenient for the parties in interest.

(2) Agenda. The bankruptcy judge shall preside over the transaction of all business at the first meeting of creditors, including the examination of the bankrupt. He shall, when necessary, determine which claims are entitled to vote at the meeting and shall conduct the election of a trustee and, if one is held, the election of a creditors' committee.

(b) Special Meetings. The court may call a special meeting of creditors on application or on its own initiative.

(c) *Final Meeting.* The court shall order a final meeting of creditors in every case in which the net proceeds realized exceed $250 and shall mail a summary of the trustee's final account to the creditors with the notice of the meeting, together with a statement of the amount of the claims allowed. The trustee shall attend the final meeting and shall, if requested, report on the administration of the estate.

ADVISORY COMMITTEE'S NOTE

This rule is derived essentially from § 55 of the Act.

Subdivision (a). Paragraph (1) follows § 55a closely in establishing limits on the time and place for the first meeting of creditors. The Judicial Conference designates regular places for holding court under § 37b(1) of the Act. The filing of an appeal from an adjudication or of a motion to vacate an adjudication or to dismiss a case is likely to cause the court to ~~postpone~~ the first meeting, but as is made clear in the first sentence of the rule, this is a matter properly lying within the discretion of the court. The last sentence of § 55a of the Act requiring the court to set a date "as soon as may be thereafter" if the first meeting by some "mischance" is not held within the statutory time limits is omitted as unnecessary.

See also Rule 501(b).

delay

Paragraph (2) is an adaptation of § 55b of the Act. The bankruptcy judge will have occasion to allow or disallow a claim at the first meeting of creditors only when there has been an objection or a creditor has filed a proof of claim insufficient on its face. See Rules 207(a) and 306(b). Ordinarily allowance of a claim at the first meeting will be made only for the purpose of enabling the creditor to vote. The bankruptcy judge will also determine any issues arising under Rule 208 at the first meeting of creditors.

Subdivision (b) is derived from § 55d of the Act but vests discretion in the court as to when or whether a

Cf. General Order 25.

special meeting of creditors shall be called. The rule does not retain the requirement of § 55c that creditors at each meeting take pertinent and necessary steps to promote the best interests of the estate and the enforcement of the Act. The trustee is charged with the duty of taking whatever steps are pertinent and necessary for these purposes. See 2 Collier ¶ 47.02 (1964). While the trustee should give heed to the wishes of creditors, the responsibility for decision rests on him. *Id.* ¶ 47.03. If he defaults in the performance of any specific duty, "the court may upon application direct him in his duty or, if he be recalcitrant, remove him for disobedience, or permit a creditor to act in his name." *Reuping Leather Co. v. Ft. Greene Nat. Bank*, 102 F.2d 372, 373 (3d Cir. 1939). ~~*Cf.* General Order 25.~~

Subdivision (c) is derived from § 47a(14) and § 55e of the Act and General Order 12(4), but a final meeting may be dispensed with under the rule even when there are assets in the estate if the net proceeds realized on liquidation of the estate do not exceed $250. The net realization is required to be determined under the schedule of additional fees chargeable in asset and nominal asset cases which has been promulgated by the Judicial Conference pursuant to § 37b of the Act. The reduction in the number of final meetings permitted by this rule should result in substantial savings of time and expense to referees' offices and facilitate earlier closing of cases.

Rule 205. Examination

(a) Examination on Application. Upon application of any party in interest, the court may order the examination of any person. The application shall be in writing unless made during a hearing or examination or unless local rules otherwise provide.

(b) Examination of Bankrupt at First Meeting. At the first meeting of creditors, the court shall publicly examine the bank-

rupt or cause him to be examined and may permit any party in interest to examine the bankrupt.

(c) Bankruptcy Judge to Preside. The bankruptcy judge shall preside at any examination under subdivision ~~(a) or~~ (b) of this rule.

(d) Scope of Examination. The examination under subdivisions (a) and (b) of this rule may relate only to the acts, conduct, or property of the bankrupt, or to any matter which may affect the administration of the bankrupt's estate, or to his right to discharge.

(e) Compelling Attendance for Examination and Production of Documentary Evidence. The attendance of any person for examination and the production of documentary evidence may be compelled by the use of a subpoena ~~as provided in Rule 916~~ for a hearing or trial.

in accordance with the provisions of Rule 916

(f) Place of Examination of Bankrupt. ~~Notwithstanding Rule 916,~~ the court may for cause shown and upon such terms as it may impose ~~authorize~~ the bankrupt to be examined under subdivision (a) at any place it designates, whether within or without the district wherein the case is pending.

Without issuing a subpoena,

order

of this rule

(g) Mileage. A person other than a bankrupt shall not be required to attend as a witness before a bankruptcy judge unless his lawful mileage and fee for one day's attendance shall be first tendered to him. If the bankrupt resides over 100 miles from the place of examination when he is required to

appear for an examination under subdivision (a) of this rule, he shall be tendered mileage allowed by law to a witness for any distance over 100 miles from his residence at the date of bankruptcy, or his residence at the time he is required to appear for such examination, whichever is the lesser.

ADVISORY COMMITTEE'S NOTE

Subdivision (a) of this rule is an adaptation of the first sentence of § 21a of the Act. No change in the persons who can apply for the examination or who can be examined under this subdivision of the Act is intended. See generally 2 Collier ¶¶ 21.06, 21.08, 21.09 (1964). The second sentence clarifies the manner of making application for an examination. The rule omits the provision in § 21a requiring a person to appear before the judge of any state court for examination. The provision appears to be unnecessary and to have been little used. The possible need for an examination before a nearby state court judge when the witness resides in the district but more than 100 miles from the place of examination is suggested in 2 Collier 332 (1964), but this need does not arise under the rule by virtue of the supersession of the special territorial limitation on holding examinations contained in the proviso of § 41a of the Act. See the comments *infra* regarding subdivisions (c) and (g) of the rule.

Subdivisions (b) and (c) are derived from § 55b of the Act, but the bankruptcy judge's duty to preside is extended by subdivision (c) to any examination covered by the rule. The case law is generally in accord. *In re Eskay*, 122 F.2d 819, 824-25 (3d Cir. 1941); *United States v. Lieberman*, 199 F.Supp. 418, 419 (S.D.N.Y. 1961); Snedecor, *The Importance of Referees' Examinations of the Bankrupt*, 36 Ref.J. 45 (1962).

Subdivision (d) combines provisions in §§ 7a(10) and 21a of the Act for the purpose of defining the scope of any examination under the rule. The references in § 7a(10) to "the conducting of his [*i.e.*, the bankrupt's] business, the cause of his bankruptcy, his dealings with

his creditors and other persons, and whereabouts of his property" as appropriate subjects of inquiry of the bankrupt are omitted from the rule because embraced by the broad definition of the scope of examination derived from the merger of other language in § 7a(10) with the definition in § 21a. It has indeed been held that the scope of examination under the latter provision is not less broad in scope than that permitted by the more elaborate definition in § 7a(10). *Freeman v. Seligson*, 405 F.2d 1326, 1333 (D.C.Cir. 1968); *Chereton v. United States*, 286 F.2d 409, 413 (6th Cir.), cert.denied, 366 U.S. 924 (1961); *Ulmer v. United States*, 219 Fed. 641, 644 (6th Cir. 1915); *In re Insull Utility Investments, Inc.*, 27 F.Supp. 887, 890 (S.D.N.Y. 1934). The provisos of § 21a relating to examination of the bankrupt's spouse are not included in the rule since (1) no special provision negating a spousal privilege is necessary (see Advisory Committee's Notes accompanying Rules 501 and 505 of the ~~proposed~~ Federal Rules of Evidence), and (2) no special limitation on spousal testimony in bankruptcy cases is warranted. *Cf.* McCormick, *Evidence*, 179-80 (1954); Hutchins & Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 Minn.L.Rev. 675 (1929).

Subdivision (c) clarifies the mode of compelling attendance of a witness or party for the production of evidence ~~for an examination~~ under this rule. The subdivision is substantially declaratory of the practice that has developed under § 21a of the Act. See 2 Collier ¶ 21.20 (1964). The special limitation of the proviso of § 41a of the Act that protects a person other than the bankrupt from being required to attend as a witness before a referee at a place over 100 miles from his residence even though within the same district is not retained in the rules. The governing limits for such a person are those prescribed by Rule 45(e)(1) of the Federal Rules of Civil Procedure, made applicable to examinations under this rule by subdivision (e) and Rule 916.

Subdivision (f) is derived from the second proviso of § 7a(10) of the Act. There are no territorial limits on the service of an order on the bankrupt. See, *e.g.*, *In re*

for an examination

and is not a limitation on subdivision (e). Any person, including the bankrupt, served with a subpoena within the range of a subpoena must attend for examination pursuant to subdivision (e). Subdivision (f) applies only to the bankrupt.

Totem Lodge & Country Club, Inc., 134 F.Supp. 158 (S.D.N.Y. 1955).

Subdivision (g) is a revision of the first proviso of § 7a(10) and the proviso of § 41a of the Act. The lawful mileage and fee for attendance at a United States court as a witness are prescribed by 28 U.S.C. § 1821.

Definition of bankrupt. The word "bankrupt" as used in this rule includes the persons specified in the definition in Rule 901(6).

Rule 206. Apprehension and Removal of Bankrupt to Compel Attendance for Examination

(a) Order to Compel Attendance for Examination. Upon a verified application of any party in interest alleging (1) that the examination of the bankrupt is necessary for the proper administration of the estate and that there is reasonable cause to believe that the bankrupt is about to leave his residence or his principal place of business to avoid examination, or (2) that he has evaded service of a subpoena or of an order to attend for examination, or (3) that he has willfully disobeyed a subpoena or order to attend for examination, duly served upon him, the court may issue to the marshal, or some other officer authorized by law, an order directing him to bring the bankrupt forthwith before the court. If after hearing the court finds the allegations to be true, the court shall thereupon examine the bankrupt or cause him to be examined as soon as possible, but, in any event, the examination shall be commenced within 10 days after he was taken into cus-

tody. If it is necessary, the court shall fix conditions for further examination and for the bankrupt's obedience to all orders made in reference thereto.

(b) Removal. Whenever any order to bring the bankrupt before the court is issued under this rule and he is found in a district other than that of the court issuing the order, he may be taken into custody under such order and removed in accordance with the following rules:

(1) If taken at a place less than 100 miles from the place of issue of the order, the bankrupt shall be brought forthwith before the court that issued the order.

(2) If taken at a place 100 miles or more from the place of issue of the order, the bankrupt shall be brought without unnecessary delay before the nearest ~~bankruptcy~~ magistrate, referee in bankruptcy, or district judge. If, after hearing, the ~~bankruptcy~~ magistrate, referee, or district judge finds that an order has issued under this rule and that the person in custody is the bankrupt, or if the person in custody waives a hearing, the ~~bankruptcy~~ magistrate, referee, or district judge shall issue an order of removal and the person in custody shall be released on conditions assuring his prompt appearance before the court which issued the order to compel his attendance.

(c) Conditions of Release. In determining what conditions will reasonably assure attendance or obedience under subdivision (a) of this rule or appearance under subdivision (b) of this rule, the court shall be governed

by the provisions and policies of Title 18, U.S.C., § 3146(a) and (b).

ADVISORY COMMITTEE'S NOTE

This rule is an elaboration of § 10 of the Act. Subdivision (a) is closely patterned on the corresponding subdivision of the statutory section, but the rule requires the bankrupt to be examined as soon as possible if allegations of the applicant for compulsory examination under this rule are found to be true after a hearing. Subdivision (b) is also derived from the corresponding subdivision of § 10 of the Act but includes in paragraphs (1) and (2) provisions adapted from subdivisions (a) and (b) of Rule 40 of the Federal Rules of Criminal Procedure, which governs the handling of a person arrested in one district on a warrant issued in another. Subdivision (c) incorporates by reference the features of subdivisions (a) and (b) of 18 U.S.C. § 3146, which prescribe standards, procedures and factors to be considered in determining conditions of release of accused persons in noncapital cases prior to trial. The word "bankrupt" as used in this rule includes the persons named in Rule 901(6).

An order issued under this rule need not be under seal or signed by the clerk of the district court. *In re Markel*, 195 F.Supp. 926 (E.D.Mich. 1961), holding warrants issued by a referee in bankruptcy for the Eastern District of Michigan for the arrest of bankrupts in California to be invalid for noncompliance with General Order 3, would not be authoritative after repeal of the general order and adoption of this rule.

Rule 207. Voting at Creditors' Meetings

(a) Right to Vote; Temporary Allowance for Voting Purposes. Except as hereinafter provided, a creditor is entitled to vote at a meeting if he has filed a proof of claim at or before the meeting, unless objection is made

or unless the proof of claim is insufficient on its face. Notwithstanding objection to the amount or allowability of a claim for the purpose of voting, the court may temporarily allow it for that purpose in such amount as to the court seems proper.

(b) Majority Vote; Creditors with Claims of $100 or Less. The trustee and the creditors' committee, if any, shall be elected by a majority vote in number and amount of claims of all creditors who are present and voting in person or by proxy. A claim of $100 or less shall be included in computing the amount, but the holder of such a claim shall not be counted in computing the number of creditors voting.

(c) Creditors with Secured or Priority Claims. A creditor holding a claim which is secured or has priority shall be entitled to vote such claim only to the extent the claim exceeds the value of his security or the amount of his priority.

(d) Creditors Excluded from Voting. The following creditors shall not be entitled to vote: a relative or affiliate of the bankrupt; a director or trustee or a stockholder, member, or officer of the bankrupt corporation; a general partner, limited partner, or person in control of the bankrupt partnership; or a person having an interest materially adverse to the estate.

ADVISORY COMMITTEE'S NOTE

This rule brings together provisions in §§ 44a, 56, and 57e of the Act dealing with voting and makes some changes.

Subdivision (a) accords any creditor who has filed a proof of claim not insufficient on its face a right to vote unless an objector overcomes the presumptive correctness attaching to the proof of claim under Rule 301(b). *Cf. In re Lenrick Sales, Inc.*, 369 F.2d 439, 442–43 (3d Cir.), cert. denied, 389 U.S. 822 (1967). The second sentence of subdivision (a) is adapted from, but goes beyond, § 57e of the Act. It recognizes the necessity for prompt disposition of objections to claims for the purpose of voting and vests discretion in the court to make a temporary allowance for that purpose without determining the amount or allowability of the claim for the purpose of distribution.

Subdivision (b) combines subdivisions a and c of § 56 of the Act but takes inflation into account by doubling the amount of the minimum claim to be counted in computing the majority in number of the creditors voting at a creditors' meeting. Creditors holding claims of $50 or less were first excluded from the numerical count of the majority by the Chandler Act in 1938 in order to restrict the power that could be exerted in creditors' meetings by those who had been able to acquire proxies from a large number of creditors with small claims. H.R.Rep. No. 1409, 75th Cong., 1st sess. 14 (1937). The increase in the minimum is in furtherance of the policy of the rules to protect bankruptcy administration against domination by those who solicit proxies for the ulterior purpose of controlling and participating in the administration.

Subdivision (c) is a revision of the wording of § 56b of the Act without change in the meaning.

Subdivision (d) is an adaptation of language in § 44 excluding certain classes of persons from participating in the election of a trustee. The rule adds to the list of excluded persons, partners and persons in control of bankrupt partnerships and persons in general who have interests materially adverse to the estate.

Rule 208. Solicitation and Voting of Proxies

(a) *Definitions.*

Proxy.

(1) A proxy includes a power of attorney,

proof of claim, or other writing authorizing any person who does not then own a claim to vote the claim or otherwise act as the owner's attorney in fact in connection with the administration of an estate in bankruptcy.

Solicitation of Proxy.

(2) The solicitation of a proxy is any communication, other than one from an attorney to a regular client who owns a claim or from an attorney to the owner of a claim who has requested the attorney to represent him, by which a creditor is asked, directly or indirectly, to give a proxy after or in contemplation of the filing of a petition by or against the bankrupt.

(*b*) *Authorized Solicitation.*

(1) A proxy may be solicited only by (A) a creditor owning a provable claim against the estate on the date of the filing of the petition; (B) a committee elected under Rule 214; (C) a committee of creditors ~~elected~~ selected by a majority in number and amount of claims of creditors whose claims are not contingent or unliquidated, ~~or disputed~~, who are not disqualified from voting under Rule 207(c) and (d), and who were present or represented at a meeting of which all creditors having claims of over ~~$100~~ $500, or the 100 creditors having the largest claims, had at least 5 days' notice in writing and of which meeting written minutes were kept and are available reporting the names of the creditors present or represented and voting and the amounts of their claims; or (D) a bona fide ~~nonprofit~~ trade or credit association, but such association may solicit only creditors who were its members or subscribers in good standing and had

provable claims on the date of the filing of the petition.

(2) A proxy may be solicited only in writing.

(c) Solicitation Not Authorized. This rule shall not be construed to permit solicitation (1) in any interest other than that of general creditors; (2) by or on behalf of any person who has taken charge of property of the bankrupt as a receiver or trustee or an assignee for the benefit of creditors; (3) by or on behalf of any person disqualified from voting under Rule 207(c) and (d); (4) by or on behalf of an attorney at law; or (5) by or on behalf of a transferee of a claim for collection only.

(d) Data Required from Holders of Multiple Proxies. At ~~least 2 days~~ before the voting commences at any meeting of creditors held under Rule 204, or at such other time as the court may direct, a holder of 2 or more proxies must file with the court a verified list of the proxies to be voted and a verified statement of the pertinent facts and circumstances in connection with the execution and delivery of the proxies, including with respect to each of the proxies that was solicited, by the proxyholder or by any other person, the following:

any time

whether

(1) a copy of the solicitation;

(2) identification of the solicitor, the forwarder, if he is neither the solicitor nor the owner of the claim, and the proxyholder, including their connections with the bankrupt and with each other, and if the solici-

tor, forwarder, or proxyholder is an association, a statement that the creditors whose claims have been solicited and the creditors whose claims are to be voted were members in good standing and had provable claims on the date of the filing of the petition, or if the solicitor, forwarder, or proxyholder is a committee of creditors, the date and place the committee was organized, a statement that the committee was organized in accordance with clause (B) or (C) of paragraph (b)(1) of this rule, the members of the committee, the amounts of their claims, when the claims were acquired, the amounts paid therefor, and the extent to which the claims of the committee members are secured or entitled to priority;

(3) a statement that no consideration has been paid or promised by the proxyholder for the proxy;

(4) a statement as to whether there is any agreement, and, if so, the particulars thereof, between the proxyholder and any other person for the payment of any consideration in connection with voting the proxy, or for the sharing of compensation with any person other than a law partner which may be allowed the trustee or any person for services rendered in the case, or for the employment of any person as attorney, accountant, appraiser, auctioneer, or other employee for the estate;

(5) if the proxy was solicited by a person other than the proxyholder, a statement signed and verified by the solicitor that no

consideration has been paid or promised by him for the proxy, and a statement signed and verified by him as to whether there is any agreement, and, if so, the particulars thereof, between the solicitor and any other person for the payment of any consideration in connection with voting the proxy, or for the sharing of compensation with any person other than a law partner which may be allowed the trustee or any person for services rendered in the case, or for the employment of any person as attorney, accountant, appraiser, auctioneer, or other employee for the estate;

(6) if the proxy was forwarded to the holder by a person who is neither a solicitor of the proxy nor the owner of the claim, a statement signed and verified by the forwarder that no consideration has been paid or promised by him for the proxy, and a statement signed and verified by him as to whether there is any agreement between the forwarder and any other person for the payment of any consideration in connection with the voting of the proxy, or for the sharing of compensation with any person other than a law partner which may be allowed the trustee or any person for services rendered in the case, or for the employment of any person as attorney, accountant, appraiser, auctioneer, or other employee for the estate; and

(7) if the solicitor, forwarder, or proxyholder is a committee, a statement signed and verified by each member as to the

amount and source of any consideration paid or to be paid to such member in connection with the case other than by way of dividend on his claim.

Restrictions [illegible] tation.

(c) Enforcement of Rule. The court on its own initiative or on application of any party in interest may determine whether there has been a failure to comply with the provisions of this rule or any other impropriety in connection with the solicitation or voting of a proxy. After such hearing as may be appropriate, the court may reject any proxy for cause, vacate any order entered in consequence of the voting of any proxy which should have been rejected, or take any other or further appropriate action.

or motion

ADVISORY COMMITTEE'S NOTE

This rule is a comprehensive regulation of solicitation and voting of proxies in bankruptcy cases. Heretofore regulation has been a matter of patchwork: General Order 39 is a narrow proscription of the solicitation of a proof of claim, power of attorney, or other kind of proxy by a receiver or his attorney. Chapter X (in §§ 209–13) and § 77(p) of the Act contain provisions dealing with the solicitation and exercise of proxies only in reorganization proceedings. A body of judicial precedents has evolved which sustains the rejection of proxies because of impropriety in connection with their solicitation. Finally, a number of courts of bankruptcy have adopted local rules regulating solicitation and voting of proxies.

The rule here proposed includes features drawn from all these sources. Most suggestive have been the local bankruptcy rules dealing with solicitation in effect in the Northern Districts of Illinois (Bankr. Rule 10) and Ohio (Bankr. Rule 4) and in the Southern and Eastern Districts of New York (Bankr. Rule 15).

Subdivision (a). The definition of proxy in the first paragraph of the rule is in large part a rephrasing of General Order 39. The definition of solicitation in the succeeding paragraph follows closely the definition found in Rule 4(g)(1) of the Bankruptcy Rules for the Northern District of Ohio.

Creditor control is a basic feature of the Bankruptcy Act. Creditor participation in administration is facilitated by the definition of "creditor" in the Act (§ 1(11)) to include the duly authorized agent, attorney, or proxy of the owner of a provable claim. Creditor democracy is perverted and the congressional objective frustrated, however, if control of administration falls into the hands of persons whose principal interest is not in what the estate can be made to yield to the unsecured creditors but in what it can yield to those involved in its administration or in other ulterior objectives.

Subdivision (b). The purpose of the rule is to protect creditors against loss of control of administration of their debtors' estates in bankruptcy to holders of proxies having interests that differ from those of the creditors. The rule does not prohibit solicitation but restricts it to those who were creditors at the commencement of the case or their freely and fairly selected representatives. The special role occupied by credit and trade associations in bankruptcy administration is recognized in the last clause of subdivision (b)(1). On the assumption that members ~~may have joined~~ an association in part for the purpose of obtaining its services as a representative in bankruptcy proceedings, an established association is authorized to solicit its own members who were creditors on the date of the filing of the petition. Although the association may not solicit nonmembers for proxies, it may sponsor a meeting of creditors at which a committee entitled to solicit proxies may be ~~elected~~ in accordance with clause (B) or (C) of subdivision (b)(1). See Comment, 51 Yale L.J. 253, 266–68 (1941).

or subscribers may have affiliated with

, or its regular customers or clients,

or nonsubscribers

selected

Subdivision (c). A creditor, creditors' committee, or association may, however, have such a relation to the estate or the case as to warrant rejection of any proxy solicited by such a person or group. Thus a person who is

forbidden by the Act to vote his own claim should be equally disabled to solicit proxies from creditors. Solicitation by or on behalf of the bankrupt has been uniformly condemned, *e.g., In re White*, 15 F. 2d 371 (9th Cir. 1926), as has solicitation on behalf of a preferred creditor, *Matter of Law*, 13 Am.B.R. 650 (S.D. Ill. 1905). The prohibition on solicitation by a receiver or his attorney made explicit by General Order 39 has been collaterally supported by rulings rejecting proxies solicited by a receiver in equity, *In re Western States Bldg.-Loan Ass'n*, 54 F. 2d 415 (S.D. Cal. 1931), and by an assignee for the benefit of creditors, *Lines v. Falstaff Brewing Co.*, 233 F. 2d 927 (9th Cir. 1956).

Subdivision (c) negates a reading of the rule to authorize solicitation by any person or group standing in any of the relations described in the preceding paragraph. It also disavows any dispensation to attorneys or to transferees of claims for collection. The rule does not undertake to regulate communications between an attorney and his regular client or between an attorney and a creditor who has asked the attorney to represent him in a proceeding under the Act, but any other communication by an attorney or any other person or group requesting a proxy from the owner of a claim constitutes a regulated solicitation. Solicitation by an attorney of a proxy from a creditor who was not a client prior to the solicitation is not objectionable merely as unethical conduct, as recognized by such cases as *In re Darland*, 184 F. Supp. 760 (S.D. Iowa 1960); more importantly the practice carries a substantial risk that administration will fall into the hands of those whose interest is in the yields of administration to the administrators rather than to the rightful beneficiaries. The same risk attaches to solicitation by the holder of a claim for collection only.

Subdivision (d). The regulation of solicitation and voting of proxies is to be effectuated by the rule principally through the imposition of requirements of disclosure on the holders of 2 or more proxies. The disclosures must be made to the court ~~at least 2 days~~ before the meeting at which the proxies are to be voted to afford the court an opportunity to examine the circumstances accompanying

the acquisition of the proxies in advance of any exercise of the proxies. In the light of its examination the court may permit the proxies that comply with the rule to be voted and reject those that do not unless the holders can effect or establish compliance in such manner as the court shall prescribe. The holders of single proxies are excused from the disclosure requirements because of the insubstantiality of the risk that such proxies have been solicited, or will be voted, in an interest other than that of general creditors.

Every holder of 2 or more proxies must include in his submission to court a verified statement that no consideration has been paid or promised for the proxy, either by the proxy-holder or the solicitor or any forwarder of the proxy. Any payment or promise of consideration for a proxy would be conclusive evidence of a purpose to acquire control of the administration of an estate for an ulterior purpose. The holder of multiple proxies must also include in his submission a verified ~~disavowal of~~ statement as to whether there is any agreement by himself, the solicitor, or any forwarder of the proxy for the employment of any person in the administration of an estate or for the sharing of any compensation allowed in connection with the administration of the estate. The provisions requiring these statements implement the policy of the Act expressed in § 62c as well as the policy of this rule to deter the acquisition of proxies for the purpose of obtaining a share in the outlays for administration. Finally the facts as to any consideration moving or promised to any member of a committee which functions as a solicitor, forwarder, or proxyholder must be disclosed by the proxyholder. Such information would be of significance to the court in evaluating the purpose of the committee in obtaining, transmitting, or voting proxies.

Subdivision (e) has counterparts in the local rules referred to earlier in this Note. Courts have been accorded a wide range of discretion in the handling of disputes involving proxies. Thus the referee has been allowed to reject proxies and to proceed forthwith to hold a scheduled election at the same meeting. *E.g., In re Portage Wholesale Co.*, 183 F. 2d 959 (7th Cir. 1950); *In re McGill*, 106

Fed. 57 (6th Cir. 1901); *In re Deena Woolen Mills, Inc.*, 114 F. Supp. 260, 273 (D. Me. 1953); *In re Finlay*, 3 Am.B.R. 738 (S.D.N.Y. 1900). The bankruptcy judge may, of course, postpone an election to permit a determination of issues presented by a dispute as to proxies and to afford those creditors whose proxies are rejected an opportunity to give new proxies or to attend an adjourned meeting to vote their own claims. *Cf. In re Lenrick Sales, Inc.*, 369 F.2d 439, 442–43 (3d Cir.), cert. denied, 389 U.S. 822 (1967); *In re Construction Supply Corp.*, 221 F.Supp. 124, 128 (E.D.Va. 1963). This rule is not intended to restrict the scope of the court's discretion in the handling of disputes as to proxies.

Rule 209. Selection of Trustee

(a) Election at First Meeting. The creditors of a bankrupt entitled to vote under Rules 207 and 208 shall elect a trustee at the first meeting, subject to approval by the court and to the provisions of this rule.

(b) Appointment by the Court. Except as provided in Rule 211, the court shall appoint a trustee if (1) the creditors do not elect a trustee; (2) the trustee elected fails to qualify; (3) a vacancy occurs in the office of trustee; or (4) a trustee is needed in a reopened case. If an elected trustee is disapproved by the court for ineligibility or other good cause, the court may appoint a trustee.

(c) Notice to Trustee of His Election or Appointment; Qualification. The court shall immediately notify the trustee of his election or appointment. The court shall also inform him ~~of~~ the penal sum of his bond and of the time fixed for the filing of a complaint objecting to the bankrupt's discharge, and

as to how he may qualify, including

if required,

shall require him forthwith to notify the court of his acceptance or rejection of the office. A trustee shall qualify ~~by filing a bond in accordance with~~ as provid Rule 212.

(d) Eligibility. A trustee shall have no interest adverse to the estate and shall be competent to perform the duties of his office. If an individual, he shall have a residence or office in the state in which the case is pending or in any adjacent state, and, if a corporation, it shall be authorized by its charter or by law to act as trustee and have an office in the state in which the case is pending.

ADVISORY COMMITTEE'S NOTE

Subdivisions (a) and (b). Subdivision (a) and the first sentence of subdivision (b) of this rule are derived from §§ 2a(17) and 44a of the Act. The option to elect 3 trustees of an estate authorized by § 44a is little used and is eliminated as unnecessary. The provision of § 44a for the appointment by the court of the trustee of a bankrupt face-amount certificate company, added to § 44a by the Investment Company Act of 1940, has likewise not been carried into the rule. It has not been applied in any reported case and appears to have had a transitional purpose. The second sentence of subdivision (b) clarifies the authority of the court to appoint a trustee whenever the creditors' choice of trustee is disapproved by the court, and follows the law as declared in *In re Eloise Curtis, Inc.*, 388 F.2d 416, 418–20 (2d Cir. 1967); 2 Collier ¶ 44.11 (1962). But *cf.* 2 Remington, *Bankruptcy* 562–63 (Henderson ed. 1956). The court's discretion to disapprove a trustee elected by the creditors is circumscribed, however, by the consideration that it must be based on a substantial reason appearing in the record. See generally 2 Collier ¶¶ 44.06–44.11 (1962); MacLachlan, *Bankruptcy* § 96 (1956); 2 Remington, *Bankruptcy* §§ 1092–1105 (Henderson ed. 1956).

Subdivisions (c) and (d). Subdivision (c) is derived from General Order 16, and subdivision (d) is a revision of § 45 of the Act. The requirement of the first sentence of subdivision (d) that the trustee have no interest adverse to the estate has been established by case law. MacLachlan, *supra*. Although § 45 of the Act has imposed a requirement of competence only in respect to an individual receiver or trustee, a corporation is neither to be excused from such a requirement nor to be conclusively presumed to be competent. See MacLachlan, *supra*. The requirement respecting a residence or office location for an individual trustee has been relaxed by the rule. The requirement of § 45(1) of the Act that an individual trustee be a resident or have an office in the judicial district within which he is appointed is unnecessarily restrictive in light of the development of metropolitan and suburban communities that cross district and state boundaries. This development does not appear to warrant a comparable relaxation respecting corporate trustees, however. Rule 213 continues the policy of the Act of June 7, 1934, 48 Stat. 923, against undue concentration of appointments of trustees, and Rule 505 contains safeguards against nepotism, undue influence, and conflict of interest in such appointments. Rule 503 incorporates the disqualification, by § 39b(2) of the Act, of a referee to act as trustee in any case.

Eligibility of receiver. The requirements of § 45 of the Act pertaining to receivers are preserved as provided in Rule 201(f).

Rule 210. Trustees for Estates When Joint Administration Ordered

(a) Election of Single Trustee for Estates Being Jointly Administered. If the court orders a joint administration of 2 or more estates pursuant to Rule 117(b), it may approve election of a single trustee by the creditors of one or more of the bankrupts for the estates being jointly administered ~~have~~

(d) Potential Conflicts of Interest. Before approving the election or appointment of one trustee for estates being jointly administered as provided in subdivision (a) or (c) of this rule, the court must be satisfied that the creditors of the different estates will not be prejudiced by conflicts of interest of the trustee

~~ing regard for the protection of creditors of the different estates against conflicts of interest on the part of the trustee so elected.~~

(b) Right of Creditors to Elect Separate Trustee. Notwithstanding entry of an order for joint administration pursuant to Rule 117(b) the creditors of any bankrupt may elect a separate trustee for his estate as provided in Rule 209(a).

(c) Appointment of Trustees for Estates Being Jointly Administered. If the creditors do not elect a trustee under subdivision (a) or (b) of this rule, the court may appoint one or more trustees for the estates being jointly administered ~~having regard for the protection of creditors of the different estates against conflicts of interest on the part of the trustee or trustees so appointed~~.

(d) Trustee for Partnership and Partners' Individual Estates. Notwithstanding the foregoing provisions of this rule, the trustee of a bankrupt partnership shall also be the trustee of the individual estate of any general partner ordered pursuant to Rule 117(b) to be administered jointly, unless the court, for cause shown, either (1) permits the creditors of a general partner to elect a separate trustee or (2) appoints a separate trustee for the individual estate.

(e) Separate Accounts. The trustee or trustees of estates being jointly administered shall nevertheless keep separate accounts of the property and distribution of each estate.

ADVISORY COMMITTEE'S NOTE

This rule recognizes that economical and expeditious administration of 2 or more estates may be facilitated not only by the selection of a single trustee for a partnership and its partners, as now authorized by § 5c of the Act, but by such selection whenever estates are being jointly administered pursuant to Rule 117. See *In re International Oil Co.*, 427 F.2d 186, 187 (2d Cir. 1970). The premise of § 5c of the Act is that, notwithstanding the potentiality of conflict between the interests of the creditors of the partners and those of the creditors of the partnership, the conflict is not sufficiently serious or frequent in most cases to warrant the selection of separate trustees for the firm and the several partners. Even before the proviso was added to § 5c of the Act in 1938 to permit the creditors of a general partner to elect their separate trustee for his estate, it was held that the court had discretion to permit such an election or to make a separate appointment when a conflict of interest was recognized. *In re Wood*, 248 Fed. 246, 249–50 (6th Cir.), cert.denied, 247 U.S. 512 (1918); 1 Collier ¶ 5.18 (1962). The rule retains in subdivision (d) the features of the practice respecting the selection of a trustee that has developed under § 5 of the Act. Subdivisions (a) and (c) permit the court to authorize election of a single trustee or to make a single appointment when joint administration of estates of other kinds of bankrupts is ordered, but requires the court to make a preliminary evaluation of the risks of conflict of interest.

Subdivision (e) is derived from § 5e of the Act and extends the duty of keeping a separate account for each estate to trustees in all cases of joint administration

If after the election or appointment of a common trustee a conflict of interest materializes, the court must take special and appropriate action to deal with it.

e

subdivision (d)

Rule 211. Trustee Not Appointed in Certain Cases

If, after examination of the bankrupt, the court determines that there is no property in the estate other than that which can be claimed as exempt and that no other circum-

stances indicate the need for a trustee, and if the creditors do not elect a trustee, the court may order that no trustee be appointed. At any time thereafter, for cause shown, a trustee may be appointed by the court.

ADVISORY COMMITTEE'S NOTE

This rule is a revision of General Order 15 to spell out more fully the circumstances that may warrant proceeding with the administration of an estate without a trustee. The last sentence of General Order 15 is deleted as unnecessary. See Rule 204.

Rule 212. Qualification by Trustee and Receiver

(a) Qualifying Bond or Security. Except as provided hereinafter, every trustee and every receiver shall, before entering upon the performance of his official duties and within 5 days after his election or appointment, qualify by filing a bond in favor of the United States conditioned on the faithful performance of his official duties or by giving such other security as may be approved by the court.

(b) Blanket Bond. The court may authorize a blanket bond in favor of the United States conditioned on the faithful performance of official duties by a trustee or receiver in more than one case or by more than one trustee or receiver.

(c) Bond Excused in Certain Cases. The

the filing of

the

court may excuse ~~a trustee or receiver from filing~~ a bond or giving other security when there appears to be an insufficient amount of property in the estate to justify the requirement of a bond or security, or when ~~the receiver~~ he will not be a custodian of any property.

(1) by a trustee or receiver

of

(2) by a receiver

(d) Qualification by Filing Acceptance. A trustee or receiver for whom a blanket bond has been filed pursuant to subdivision (b) of this rule or who is excused from filing a bond or giving security pursuant to subdivision (c) hereof shall qualify by filing his acceptance of his election or appointment in lieu of the bond.

(e) Amount of Bond and Sufficiency of Surety. The court shall determine the amount of the bond and the sufficiency of the surety for each bond filed under this rule.

(f) Filing of Bond; Proceeding on Bond. Unless otherwise provided by local rule, a bond given under this rule shall be filed with the referee. A proceeding on the bond of a trustee or receiver may be brought by any party in interest in the name of the United States for the use of the person injured by the breach of the condition. No proceeding shall be brought on a trustee's or receiver's bond more than 2 years after his discharge.

(g) Evidence of Qualification. A certified copy of the order approving the bond or other security given by a trustee or receiver under subdivision (a) or of his acceptance filed under subdivision (d) of this rule shall constitute conclusive evidence of his ~~appointment and~~ qualification.

ADVISORY COMMITTEE'S NOTE

Subdivision (a) of this rule is based on § 50b of the Act but recognizes that security other than a bond may be given by a trustee or receiver as a mode of qualifying under the rule.

Subdivisions (b), (c), and (d). Subdivision (b), which is new, gives explicit authority for approval by the court of a single bond to cover (1) a person who qualifies as trustee (or receiver) in a number of cases, and (2) a number of trustees (or receivers) each of whom qualifies in a different case. The cases need not be related in any way. Substantial economies can be effected if a single bond covering a number of different cases can be issued and approved at one time. The interests of economy and expeditious administration can also be served by eliminating pursuant to subdivision (c) the necessity for a bond in no-asset cases and those in which the property in the estate is so insubstantial in amount and value as to make the bond a needless expense. When a blanket bond is filed or the giving of a bond or other security is waived altogether, the trustee or receiver qualifies under subdivision (d) of the rule by filing an acceptance of the office.

Subdivision (e) vests general authority and responsibility in the court for determining the adequacy of the bond and the sufficiency of the sureties thereon in lieu of the detailed provisions in subdivisions b, c, d, e, f, and g of § 50 of the Act that deal with these matters.

Subdivision (f) is derived from § 50h and m of the Act. The sentence requiring the bond generally to be filed with the referee, rather than the clerk of the court as provided in § 50h, is consonant with the provision in Rule 509(a) that after reference all papers shall be filed with the referee. A bond filed under this rule should conform to Official Form No. 19. A proceeding on the bond of a trustee or receiver is governed by the rules in Part VII. See the Note accompanying Rule 701. See also Rule 925.

Subdivision (g) is a revision of § 21e of the Act to prescribe the evidentiary effect of a certified copy of an order approving any security given by a trustee or receiver under this rule or, when a blanket bond has been

authorized, of a certified copy of his acceptance. This rule supplements the Federal Rules of Evidence, which apply in bankruptcy cases. See Rule 917. A certified copy of the order approving the trustee's bond may be recorded in accordance with Rule 602(a) and given the effect of constructive notice of the pendency of the bankruptcy case as provided in § 21g of the Act. The order of approval should conform to Official Form No. 20.

Omitted provisions of § 50 of Act. The requirement of a referee's bond ~~is abolished by Rule 502~~, and the numerous references to the referee's bond in § 50 of the Act are no longer necessary. The provision for joint and several bonds in § 50j of the Act has not been retained since joint receivers and joint trustees are not authorized in the rules. The bond of a designated depository is dealt with in Rule 512. The provision in § 50k of the Act stating the effect of a failure to file a bond is omitted from the rules as unnecessary.

has been abolished (see Rule 502),

Rule 213. Limitation on Appointment of Receivers and Trustees

No standing receiver or trustee may be appointed. Appointments of receivers and trustees by the court shall be apportioned so that the aggregate compensation of any one appointee shall not be excessive.

Advisory Committee's Note

This rule is an elaboration of General Order 14. Its prohibition on the appointment of "official" and "general" trustees is revised to extend to "standing receivers and trustees." The latter term comprehends both official and general trustees and is a more familiar description of such officers. The policy underlying the general order is as much opposed to standing receivers as to standing trustees.

The rule also reflects the policy of the Act of June 7, 1934, 48 Stat. 923, 11 U.S.C. § 76a (1964), in requiring

an apportionment of appointments of receivers and trustees to keep compensation of such appointees from becoming excessive. The rule does not restrict the election of trustees by creditors under ~~Bankruptcy~~ Rule 209.

Rule 214. Creditors' Committee

The creditors entitled to vote for a trustee may, at the first meeting or at any special meeting called for that purpose, elect a committee of 3 or more creditors. The committee may consult with the trustee in connection with the administration of the estate, make recommendations to the trustee respecting the performance of his duties, and submit to the court any question affecting the administration of the estate.

of creditors

ADVISORY COMMITTEE'S NOTE

This rule is derived from § 44b of the Act. The provision for election of the committee at a special meeting of creditors is new.

Rule 215. Employment of Attorneys and Accountants

(a) Conditions of Employment of Attorneys and Accountants. No attorney or accountant for the trustee or receiver shall be employed except upon order of the court. The order shall be made only upon application of the trustee or receiver, stating the specific facts showing the necessity for such employment, the name of the attorney or accountant, the reasons for his selection, the professional services he is to render, and to

the best of the applicant's knowledge all of the attorney's or accountant's connections with the bankrupt, the creditors, or any other party in interest, and their respective attorneys and ~~accounts~~. If the attorney or accountant represents or holds no interest adverse to the estate in the matters upon which he is to be engaged, and his employment is in the best ~~interests~~ of the estate, the court may authorize his employment. Notwithstanding the foregoing sentence, the court may authorize the employment of an attorney or accountant who has been employed by the bankrupt when such employment is in the best interest of the estate. The employment of any attorney or accountant shall be only for the purposes specified in the order, but the court may authorize a general retainer of an attorney when necessity therefor is shown.

accountants

interest

(b) Employment of Attorney or Accountant with Adverse Interest. If without disclosure any attorney or accountant employed by the trustee or receiver shall represent or hold, or shall have represented or held, any interest adverse to the estate in any matter upon which he is so employed, the court may deny the allowance of any compensation to such attorney or accountant, or the reimbursement of his expenses, or both, and may also deny any allowance to the trustee or receiver if it shall appear that he failed to make diligent inquiry into the connections of such attorney or accountant.

(c) Employment by a General Creditor. An attorney or accountant shall not be disqualified to act as attorney or accountant for the trustee or the receiver merely because of his employment by a general creditor in the case.

(d) Employment of Attorney or Accountant on Salary. A trustee or receiver authorized to operate the business and manage the property of the bankrupt may, without specific authorization under subdivision (a) of this rule, continue or engage any attorney or accountant as a salaried employee if such employment is necessary in the operation of the business and management of the property of the bankrupt.

(e) Employment of Trustee or Receiver as Attorney or Accountant. The court may authorize the trustee or receiver to act as an attorney or accountant for the estate if such authorization is in the best interest of the estate.

(f) Services Rendered by Member or Associate of Attorney or Accountant. If, under this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, or if a named attorney or accountant is employed on behalf of a professional partnership or corporation, any member or regular associate of the firm may act for the attorney or accountant so employed, without further order of the court, and his services may be compensated as services of the attorney or accountant in accordance with Rule 219.

ADVISORY COMMITTEE'S NOTE

Subdivisions (a) and (b) of this rule are a revision of General Order 44. Subdivision (c) is an adaptation of § 44c of the Act. Subdivisions (d), (e), and (f) are new. The rule assimilates the employment of accountants and attorneys in cases under the Act. The premise of this change is that the same standards for determining disinterestedness, qualifications, and the need for professional services should be applied with respect to accountants as are now applicable to attorneys.

The rule recognizes that the holding as well as the representation of an interest adverse to the estate may have a disqualifying effect on an attorney or accountant and should therefore be disclosed to the court before his employment is authorized. The sanction of disallowance for nondisclosure of an adverse interest is also extended so as to apply to the situation where an attorney or accountant, after his employment has been duly authorized under this rule, represents or acquires an interest adverse to the estate in a matter on which he is employed.

Subdivision (a). The verification heretofore required by the first sentence of General Order 44 has been deleted in accordance with the policy expressed in Rule 911. The word "application" in the same sentence of the general order is substituted for "petition" in recognition of the statutory definition of petition in § 1(24) to mean a document initiating proceeding under the Act. A new sentence in subdivision (a) authorizes re-employment of an attorney in certain cases, notwithstanding his prior connection with the bankrupt, in order to permit the utilization of special knowledge and experience which may be of substantial benefit to the estate.

Subdivision (b) is an adaptation of the third sentence of General Order 44. The word "estate" has been substituted in lieu of the reference in this sentence of the general order to "the receiver, trustee, creditors or stockholders." The interests of stockholders may not be identical to those of the receiver, trustee, or creditors, but insofar as the interests of the estate may not embrace those of stockholders, the substitution of the less

comprehensive term is not objectionable. The representation or holding of an undisclosed interest in no way adverse to the estate should afford the court no basis for denying compensation to an attorney or accountant because the interest is adverse to the stockholders. Indeed, effective representation of a trustee or receiver by an attorney seems likely to run counter to the interests of the stockholders in a considerable number of cases, and such representation should not be discouraged by these rules.

Subdivision (c), like § 44c of the Act, rests on the premise that the interests of all general creditors of a bankrupt are identical. Thus an attorney who has previously represented a general creditor, or is representing him in connection with the bankruptcy of his client's debtor, is not ordinarily subject to any conflict of interest. The term "general creditor" is used in the same sense here as in § 44c, *viz.*, a creditor without security and without any priority under § 64 of the Act. Analysis of H.R. 12889, 74th Cong., 2d Sess. 158 (1936). Of course, if there is a question as to the validity or the amount of a general creditor's claim, his attorney would be subject to a disqualifying interest. See 2 Collier 1681 n.5 (1962).

Subdivision (d) is added to negative any inference that this rule is intended to require a specific court authorization of the employment of salaried attorneys or accountants when such employment is usual and necessary in the operation of the bankrupt's business when continued by order of the court. A general authorization to conduct a bankrupt's business implies the grant of authority to hire employees reasonably required for such operation, without specific prior approval of each employment by the court. 3A Collier ¶ 62.15 (1961); 6A *id.* ¶ 8.14[1] (1965); 8 *id.* ¶ 6.35 (1963). A court may nevertheless particularize in an order approving the continued operation of a bankrupt's business the extent of authority granted with respect to the employment of personnel.

Subdivision (e) recognizes the propriety of an order of the court authorizing a trustee or receiver to act as his own attorney or accountant but requires the court to find that such an authorization is in the best interest of the

estate. In conjunction with Rule 219 subdivision (e) establishes the necessity of an order of authorization as a condition of any allowance of compensation for professional services rendered as an attorney or accountant for the estate. See *In re Mabson Lbr. Co.*, 394 F.2d 23, 24 n.3 (2d Cir. 1968). It is not intended that such an authorization should be required or compensation allowed for the performance of the ordinary duties of a trustee, including the collection of accounts, preparation of required records and reports, protection of the estate against unfounded claims, etc.

Subdivision (f), together with the definitions of "attorney" and "accountant" in Rule 901, recognizes the propriety of the employment of a professional corporation or partnership as an attorney or accountant under this rule. The subdivision clarifies the effect of an order authorizing the employment of a firm, or of an attorney or accountant on behalf of a firm, so that members or regular associates of the firm may perform compensable services for the attorney or accountant employed by the court without the necessity of a particular court order identifying each such member or regular associate authorized to render such services.

Rule 216. Authorization of Trustee To Conduct Business of Bankrupt

The court may authorize the trustee to conduct the business of the bankrupt for such time as may be in the best ~~interests~~ of the estate and consistent with orderly liquidation thereof.

and manage the property

and on such conditions

interest

ADVISORY COMMITTEE'S NOTE

This rule, together with Rules 201(a)(2) and 202, permits continuation of the bankrupt's business on authorization of the court as heretofore provided in § 2a(5) of the Act. The business of a bankrupt should not be con-

tinued indefinitely nor for a term longer than is consistent with the bankruptcy objective of orderly liquidation of the estate. See *In re Airlines Transport Carriers, Inc.*, 129 F.Supp. 679, 683 (S.D.Cal. 1955); *In re Lisk Mfg. Co.*, 167 Fed. 411, 413–14 (W.D.N.Y. 1908); 1 Collier ¶ 2.34 (1968).

Rule 217. Ancillary Proceedings

(a) Ancillary Receivership Abolished. No ancillary receiver may be appointed in a bankruptcy case. Unless it is inconsistent with the order appointing him, a receiver appointed in a bankruptcy case has capacity to represent the bankrupt estate in any court.

(b) Reference of Ancillary Proceeding. Any complaint, motion, or application for ancillary relief in a court of bankruptcy shall be referred by the clerk of the court in which it is filed to a referee of that court.

ADVISORY COMMITTEE'S NOTE

Subdivision (a). In abolishing ancillary receiverships in bankruptcy, this rule adopts the practice for straight bankruptcy that has already been established for debtor relief proceedings. See MacLachlan, *Bankruptcy* 80 (1956). In recognizing the capacity of a receiver in bankruptcy to act outside the district of his appointment, it also conforms to the usual rule respecting the capacity of receivers appointed in United States courts. See Rule 17(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 754, recognizing the capacity of any nonbankruptcy receiver appointed by a United States district court "to sue in any district without ancillary appointment." *Cf.* Rule 717. The second sentence of subdivision (a) is not intended, however, to declare a rule binding on the courts of a foreign jurisdiction.

Subdivision (b). The availability of nationwide service

of process under Rule 704(f)(1) should substantially reduce the need for ancillary proceedings, and elimination of the necessity for the appointment of an ancillary receiver should simplify significantly the procedure when ancillary proceedings are necessary. The rule will supersede § 69c of the Act as well as General Order 51. *Cf.* § 2a(20) of the Act. The provision for automatic reference of any complaint, motion, or application for ancillary relief consists with provisions for automatic reference of cases and adversary proceedings transferred pursuant to Rules 116(d) and 782 respectively. *Cf.* Rule 515.

Subdivision (b) has no application to complaints commencing plenary actions in the United States district courts by or against trustees and receivers. See 1 Collier ¶ 2.74 (1968).

Rule 218. Duty of Trustee to Keep Records, Make Reports, and Furnish Information

A trustee shall: (1) within a reasonable time after entering upon his duties file a complete inventory of the property of the bankrupt unless such an inventory has already been filed or unless the court otherwise directs; (2) keep a record of receipts and the disposition of money and property received; (3) furnish information concerning the estate and its administration when reasonably requested by a party in interest, except as otherwise directed by the court; (4) make a written report to the court of the financial condition of the estate and the progress of its administration within a month after his qualification and every 3 months thereafter, unless the court by local rule or order otherwise directs; and (5) file a final report and account containing a detailed

statement of receipts and disbursements. If a final meeting of creditors is ordered, the final report and account of the trustee shall be filed at least 15 days before the meeting.

ADVISORY COMMITTEE'S NOTE

This rule combines provisions from General Order 17 and §§ 47a and 49 of the Act into a catalogue of duties of a trustee in respect to record-keeping, making reports, and providing information concerning the estate he is administering. Clause (1) of the rule is substantially a restatement of General Order 17(1) but gives the trustee a reasonable time for filing a complete inventory of the bankrupt's property. Clauses (2), (3), (4), and (5) are derived from clauses (5), (10), (12), and (13) of § 47a of the Act. The duty to report to the court the exemptions to which the bankrupt is entitled, heretofore prescribed by § 47a(6) of the Act and General Order 17(2), is set forth in Rule 403(b).

The trustee's duty to furnish information is limited to that of responding to reasonable requests and is subject to the court's authority to enter protective orders under Rules 726 and 918. Thus a party to litigation against the trustee may be required to make the kind of showing specified in Rule 26(b)(3) of the Federal Rules of Civil Procedure in order to obtain discovery of documents and tangible things prepared by or for the trustee in anticipation of litigation or for trial. The trustee may also be entitled to one of the kinds of protective orders set out in Rule 26(b)(4) of the Federal Rules of Civil Procedure or in Rule 918 of these rules. Criminal sanctions are imposed by 18 U.S.C. § 154 for a knowing refusal by a trustee or other bankruptcy officer "to permit a reasonable opportunity for the inspection of the documents and accounts relating to the affairs of estates in his charge by parties in interest when directed by the court to do so." See 2 Collier ¶ 29.13 (1961). The trustee's duty of providing information under this rule may be adequately performed when he makes available to a party in inter-

est the books and records containing the information sought. *In re Berneddy's, Inc.*, 108 F.Supp. 183, 185 (D.Mass. 1952), aff'd sub nom. *Massachusetts v. Widett*, 204 F.2d 512 (1st Cir. 1953). The provision in § 49 of the Act for accessibility of the accounts and papers of the trustee and receiver is covered by clause (3) of this rule and by Rule 201(i), which requires receivers generally to perform the duties prescribed by Rule 218.

See also Rules 508 and 510.

The rule follows the statute in requiring the first financial report to be made by the trustee within the first month after his qualification but prescribes quarterly rather than bimonthly reports thereafter in the interest of reducing requests for extension and paperwork not necessary in the typical case. The rule recognizes that the court may, by a local rule generally applicable or an order entered in a particular case, require more frequent reports. The last sentence of the rule is correlated with Rule 204(c), which requires a final meeting to be held only when the net proceeds realized exceed a prescribed amount. Official Form No. 30 is prescribed for use by the trustee in a no-asset case.

The provisions in General Order 17(3) for a procedure to be followed when a trustee fails to perform his duty to file a report or statement and in General Order 17(4) for reference of all accounts of trustees and receivers to the referee for audit are eliminated as unnecessary. See Rule 221(a) in regard to proceedings to remove a trustee and Rule 514 in regard to passing on the final account.

Rule 219. Compensation ~~of Trustees, Receivers, Marshals, Attorneys, and Accountants~~ for Services Rendered and Reimbursement of Expenses Incurred in a Bankruptcy Case and Reimbursement.

(a) Application for Compensation. A ~~trustee, receiver, marshal, attorney, or accountant~~ person seeking compensation for services ~~rendered by him in a bankruptcy case~~ , or reimbursement of necessary expenses, from the estate shall file with the court ~~his~~ an application setting forth ~~the nature, extent, and value of~~ a detailed statement of (1) the services rendered, ~~and~~ the ~~amount~~ amounts requested and (2) expenses incurred, and

The application shall include a statement by the applicant as to what payments have theretofore been made or promised to him for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation he has previously received has been shared and whether an agreement or understanding exists between the applicant and any other person for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any such sharing of compensation or agreement or understanding therefor, except that the details of any agreement by the applicant for the sharing of his compensation as a member of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other person on his behalf.

or regular associate

(b) Disclosure of ~~Arrangements Regarding~~ Compensation ~~by~~ Attorney for Bankrupt. Every attorney for a bankrupt, whether or not he applies for compensation, shall file with the court on or before the first date set for the first meeting of creditors, or at such other time as the court may direct, a statement setting forth the compensation paid or promised him for the services rendered or to be rendered in connection with the case, the source of the compensation so

Paid or Promised to

paid or promised, and whether the attorney has shared or agreed to share such compensation with any other person. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of his compensation with a member or regular associate of his law firm shall not be required.

(c) Factors in Allowing Compensation.

(1) General. The compensation ~~allowed~~ allowable by the court to a trustee, receiver, marshal, attorney, accountant, or other person entitled ~~thereto~~ to compensation for services rendered in the administration of a bankrupt estate shall be reasonable, and in making allowances the court shall give due consideration to the nature, extent, and value of the services rendered as well as to the conservation of the estate and the interests of creditors.

(2) Trustee, Receiver, or Marshal. The compensation allowed by the Act to a trustee, receiver, or marshal shall be in full compensation for the services performed by him as required by the Act and by these rules, but shall not be deemed to cover expenses necessarily incurred in the performance of his duties and allowed upon the settlement of his accounts. Additional compensation may be allowed for legal or other services not required of him by the Act or by these rules, but only if such services were authorized by order of the court before they were rendered.

(3) Attorney or Accountant. Compensation may be allowed an attorney or an accountant only for professional services.

(d) Restriction on Sharing of Compensation. Except as herein provided, a ~~trustee, receiver, marshal, attorney, or accountant~~ person rendering services in a bankruptcy case or in connection with such a case shall not in any form or guise share or agree to share the compensation paid or allowed him for such services with any person, nor shall he share or agree to share in the compensation of any other person rendering services in a case under the Act or in connection with such a case. This rule does not prohibit an attorney or accountant from sharing his compensation as trustee, receiver, attorney, or accountant with a member or regular associate of his firm, or from sharing in the compensation received by his firm or by any other member or regular associate thereof, and does not prohibit an attorney for a bankrupt or for a petitioning creditor from sharing his compensation for services rendered with any other attorney contributing thereto. If a person violates this subdivision, the court may deny him compensation, may hold invalid any transaction subject to examination under Rule 220 to which he is a party, or may enter such other order as may be appropriate.

from the estate

other

ADVISORY COMMITTEE'S NOTE

Authority for the allowance and payment of compensation and reimbursement of expenses to officers, except referees, and employees out of an estate undergoing administration in bankruptcy is found in §§ 48a, 52b, 62a(1), and 64a(1) of the Act. This rule prescribes the procedure for making application for compensation and reimbursement of necessary expenses of trustees, receivers, marshals, attorneys, and

accountants and provides guides for the court in making allowances. The rule is derived from subdivisions b, c, and d of § 62 and the first paragraph of § 72 of the Act, the last sentence of 11 U.S.C. § 76a, and General Orders 35(3) and 42. All of the provisions cited in the preceding sentence are superseded by these rules.

The premise for including in these rules provisions governing the allowance of compensation to officers, attorneys, and accountants is that it is peculiarly a judicial responsibility to supervise the administration of estates and in particular to assure that allowances for compensation to those rendering services in connection therewith are fair but not excessive. 3A Collier ¶ 62.05[3] (1961). The costs of bankruptcy administration have been a matter of continuing concern in the history of American bankruptcy law. *Id.* ¶ 62.02. This concern has led to an increasing recognition of the necessity for close judicial control of these costs. The General Orders have contained numerous provisions regulating compensation of officers, attorneys, and accountants in bankruptcy cases. See particularly General Orders 35(1)-(3), 40, 42, 43, 44, and 45. See also 3A Collier, *supra* ¶ 62.02[4].

Applications for compensation. This rule assimilates the practice in respect to applications for and allowance of compensation to accountants to that which has developed under § 62 of the Act in respect to applications for and allowance of compensation to attorneys. This treatment is a corollary of the conformation by Rule 215 of the procedure for employing accountants to that prescribed for employing attorneys. All allowances of compensation under this rule are exercises of the court's discretion, but inasmuch as allowances to attorneys and accountants are not subject to the limitations imposed by § 48 of the Act on the compensation of receivers, marshals, and trustees, there is special need for detail in applications for compensation of attorneys and accountants. Such applications should indicate all relevant information having a bearing on the compensation to be allowed. See *Report of the Proceedings of the Judicial*

Conference of the United States, March 30–31, 1967, p. 31. ~~In respect to an attorney's compensation, it has been said that~~

~~"The principal factors which enter into a determination of what is reasonable are the time spent, the intricacy of the questions involved, the size of the estate, the opposition encountered, the results obtained and the 'economic spirit' of the Bankruptcy Act to curtail unnecessary expenses." *In re Paramount Mercial, Inc.*, 253 F.2d 482, 485 (2d Cir. 1958).~~

The disclosure requirements of § 62d of the Act have been extended by subdivision (a) to cover all payments for services in connection with the case, whether or not made pursuant to previous allowances, and the source of such payments. Requiring such disclosures will strengthen the court's hand in dealing with the evils of fee-splitting and in discovering arrangements and relationships which may exert an adverse influence on administration of the estate. Consistently with the recognition in subdivision (d) of the propriety of the sharing of professional compensation by the members of a firm, an applicant for an allowance of compensation is excused from disclosing the details of the partnership agreement or other arrangement for the distribution of compensation among members of a firm of lawyers or accountants. The provisions of the rule regarding the sharing of professional compensation continue the policy of the Act as expressed in the proviso to § 62c but extend it ~~not merely to law partners but~~ to ~~associate~~ members of a law partnership, to ~~associate~~ members and ~~partners~~ of an accounting partnership, and to the professional members of an incorporated firm of attorneys or accountants. The last sentence of subdivision (a) makes it clear that the disclosures required to be made by an attorney or an accountant when he applies for an allowance of compensation are equally necessary when local practice permits a creditor or any other person to apply ~~on behalf of the attorney or accountant~~ for ~~compensation~~ for professional services. See 3A Collier ¶ 62.29[1] (1961).

Disclosure by bankrupt's attorney. Subdivision (b) of this rule is new and facilitates examination pursuant to

and regular associates

and regular associates

regular associates as well as

regular associates

and regular associates

reimbursement of expenses incurred

Rule 220 of payments and arrangements for payment of his attorney by the bankrupt. Rule 220(a) authorizes the court to examine transactions whereby the debtor directly or indirectly pays money or transfers property to his attorney for services, and the disclosure required by subdivision (b) covers divisions of compensation and agreements therefor, however received and whatever its source, so long as the compensation is for services rendered in contemplation of or in connection with the bankruptcy case. Such disclosure is a safeguard against roundabout depletions of the estate and impositions on the bankrupt contrary to the purpose underlying Rule 220.

Factors in allowing compensation. The measure of compensation to receivers, marshals, and trustees in bankruptcy is governed by subdivisions a–c of § 48 of the Act and by subdivisions (c) and (d) of this rule. The requirement of § 48d of the Act that the court apportion compensation of officers under certain circumstances is omitted from the rules as unnecessary. The abolition of ancillary receiverships by Rule 217(a) and of multiple trustees by Rule 209 eliminates many of the occasions for apportionment. When different persons serve as receiver and trustee or when more than one person serve as successive receivers or successive trustees, the guides embodied in paragraph (1) of subdivision (c) govern. The number of officers required to complete the administration of an estate should not be a factor augmenting its costs.

INSERT ATTACHED
BEGIN NEW PARAGRAPH

Paragraphs (2) and (3) of subdivision (c) of this rule require the court when making allowances to distinguish professional legal and accounting services from other kinds of services, including those required of a trustee, receiver, or marshal. A trustee or receiver may be authorized pursuant to Rule 215(d) to perform professional services for the estate when such an authorization is in the best interest of the estate. The words, "as required by the Act," have been inserted in the first sentence of paragraph (2) of subdivision (c) of this rule (as they were inserted in § 72 of the Act) as a qualification of the

NO PARAGRAPH

In respect to an attorney's compensation, it has been said that

"The principal factors which enter into a determination of what is reasonable are the time spent, the intricacy of the questions involved, the size of the estate, the opposition encountered, the results obtained and the 'economic spirit' of the Bankruptcy Act to curtail unnecessary expenses." In re Paramount Merrick, Inc., 252 F.2d 482, 485 (2d Cir. 1958).

word "services" to make it clear that the limitations on compensation allowable to officers do not prevent the allowance of compensation for services rendered beyond those required of them by the Act and by the rules. See *Matter of Balsa Wood Co., Inc.*, 46 Am.B.R. (n.s.) 661 (S.D.N.Y. 1940). The last sentence of paragraph (2) makes clear the impropriety of any additional allowance for such services, however, unless they were authorized by the court in advance of their performance. Rule 215[illegible](a) permits such an authorization only if it is in the best interest of the estate.

Paragraph (3) of subdivision (c) is an extension of the rule of General Order 42, which has been viewed as an implementation of the first sentence of § 72 of the Act. See *In re Mabson Lumber Co.*, 394 F.2d 23, 24 (2d Cir. 1968); 3A Collier ¶ 62.09[2] (1961). The fees authorized by § 64a(1) of the Act to be paid to attorneys for bankrupts and for petitioning creditors as an administrative expense are likewise limited to compensation for "the professional services actually rendered." See *In re Lane Lumber Co.*, 30 Am.B.R. 749, 753–55 (D. Idaho 1913), aff'd, 213 Fed. 587, 590 (9th Cir. 1940); *In re Sage*, 225 Fed. 397, 398 (S.D. Iowa 1915); *cf. In re Charles Ray Glass, Inc.*, 47 F.Supp. 428, 430 (S.D. Cal. 1942) (requiring refund by bankrupt's attorney under § 60d of the Act).

Sharing of Compensation. The sharing of compensation allowed to an attorney with a forwarding attorney, heretofore permitted under § 62c of the Act, is no longer authorized unless the attorney sharing in the compensation has contributed to the services for which the compensation is allowed. This change in the law harmonizes the practice in respect to the sharing of fees with Canon 34 of the Canons of Professional Ethics and Disciplinary Rule 2–107 of the Code of Professional Responsibility adopted by the American Bar Association. See Drinker, *Legal Ethics* 186–88 (1953); Smith, *Canon 2: "A Lawyer Should Assist the Legal Profession in Fulfilling its Duty to Make Legal Counsel Available,"* 48 Tex.L.Rev. 285, 297 (1970). The rule prohibits division of compensation

paid or agreed to be paid before bankruptcy as well as afterward. As Chief Justice Taft pointed out in *Weil v. Neary*, 278 U.S. 160, 173 (1929), arrangements for division of compensation are contrary to public policy not only because of "actual evil results but their tendency to evil in other cases."

> "Any division of fees or other compensation represents, above all, an incentive for the applicant to claim a compensation high enough to make his own share in it a worthwhile remuneration. It thereby tends toward extravagance of expenditure. Another evil is that it subjects the officer or attorney entitled to compensation to outside influences, over which the court has no control and which may affect the administration by depriving the court's functionaries of their requisite independence of judgment. Finally, it results in a clear transfer of judicial power over expenditure and allowances from the court to persons who, at best, have a distinctly lesser degree of public responsibilities." 3A Collier 1637 (1961).

The second sentence of subdivision (d) resolves a doubt existing under § 62c of the Act as to whether an attorney or accountant may share compensation allowed him as trustee or receiver with a member of a professional or regular associate firm to which he belongs. See *In re Ira Haupt & Co.*, 361 F.2d 164, 167-68 (2d Cir. 1966), and *In re Street Railways Advertising Co.*, 54 F.Supp. 577, 578 (S.D.N.Y. 1940); compare 3A Collier, *supra* 1639.

Neither denial of compensation nor invalidation of an arrangement for compensation pursuant to subdivision (d) of this rule is an exclusive sanction for violation of the subdivision. A person may be removed from office or dismissed from his employment for such a violation. 3A Collier, *supra* 1639 n. 8. The provision in § 48e of the Act authorizing all compensation to be withheld from any receiver, trustee, attorney, or other person ousted from his position because of unlawful sharing of compensation is omitted from the rule because it only partially covers the grounds for withholding compensation and is unnecessary. See 2 Collier ¶ 48.11 (1962); 3A *id.* ¶ 62.29[1] (1961). General Order 43, authorizing denial of any allowance to an attorney for petitioning creditors, is omitted from the rules for like reasons. See 3A Collier, *supra* ¶ 62.29[4].

Rule 220. Examination of Bankrupt's Transactions With His Attorney

(a) Payment or Transfer to Attorney in Contemplation of Bankruptcy. ~~Upon~~ On motion by ~~the trustee or any creditor~~ any party in interest or ~~upon~~ the court's own initiative, the court may examine any payment of money or any transfer of property by the bankrupt, made directly or indirectly and in contemplation of the filing of a petition by or against him, to an attorney for services rendered or to be rendered.

(b) Payment or Transfer to Attorney, or Agreement Therefor, After Bankruptcy. ~~Upon~~ On motion by the bankrupt or ~~upon~~ on the court's own initiative, the court may examine any payment of money or any transfer of property~~ by the bankrupt~~, or any agreement therefor, by the bankrupt to an attorney after bankruptcy, whether the payment or transfer is made or is to be made directly or indirectly, if the payment, transfer, or agreement therefor is for services in any way related to the bankruptcy.

(c) Invalidation of Unreasonable Payment, Transfer, or Obligation. Any payment, transfer, or obligation examined under subdivision (a) or (b) of this rule shall be held valid only to the extent of a reasonable amount as determined by the court. The amount of any excess found to have been paid or transferred under subdivision (a) or (b) may be recovered for the benefit of the estate or the bankrupt, as their interests

may appear, and any obligation found to be excessive may be cancelled to the extent of the excess.

~~*(d) Recovery of Excessive Payment or Transfer.* Any proceeding commenced by the trustee or other party in interest to recover an excessive payment or transfer of property or avoid an obligation made pursuant to a transaction examined under this rule is governed by the rules in Part VII.~~

ADVISORY COMMITTEE'S NOTE

This rule is derived from § 60d of the Act. The rationale for the exercise of the rule-making power in this area is stated in the second paragraph of the Note to Rule 219. Information required to be disclosed by the attorney for a bankrupt by Rule 219(b) and by the bankrupt in his Statement of Affairs (Item #15 of Form No. 7, Item #20 of Form No. 8) will assist the court in determining whether to proceed under this rule. Section 60d was enacted in recognition of "the temptation of a failing debtor to deal too liberally with his property in employing counsel to protect him in view of financial reverses and probable failure." *In re Wood & Henderson*, 210 U.S. 246, 253 (1908). This rule, like § 60d of the Act, is premised on the need for and appropriateness of judicial scrutiny of arrangements between a bankrupt and his attorney to protect the creditors of the estate and the bankrupt against overreaching by an officer of the court who is in a peculiarly advantageous position to impose upon both the creditors and his client. 3 Collier 1141, 1153 (1964); MacLachlan, *Bankruptcy* 318 (1956).

Rule 914 applies to any contested matter arising under this rule.

Rule 221. Removal of Trustee or Receiver; Substitution of Successor

(a) Removal for Cause. On application of any party in interest or on the court's own

initiative and after hearing on notice, the court may remove a trustee or receiver for cause and appoint a successor.

(b) Substitution of Successor. When a trustee or receiver dies, resigns, is removed, or otherwise ceases to hold office during the pendency of a bankruptcy case, his successor is automatically substituted as a party in any pending action, proceeding, or matter without abatement.

ADVISORY COMMITTEE'S NOTE

Subdivision (a) of this rule is derived from § 2a(17) of the Act. It may be appropriate in a proceeding under this subdivision, especially one initiated by the court, to appoint a receiver under Rule 201(a) to represent the estate for the limited purposes of the proceeding.

Subdivision (b) is an elaboration of § 46 of the Act. *Cf.* § 1(22) of the Act. The references in § 46 to a "joint receiver" and "joint trustee" are omitted from this rule by virtue of the fact that no more than one trustee at a time is authorized to be elected or appointed under Rule 209. Rule 725, which governs the substitution of parties in adversary proceedings, is correlated with this rule.

PART III. CLAIMS AND DISTRIBUTION TO CREDITORS

Rule 301. Proof of Claim

(a) Form and Content; Who May Execute. A proof of claim shall consist of a statement in writing setting forth a creditor's claim and, except as provided in Rules 303 and 304, shall be executed by the creditor or by his ~~duly~~ authorized agent. A proof of claim for wages, salary, or commissions shall conform substantially to Official Form No. 16; any other proof of claim shall conform substantially to Official Form No. 15.

or No. 16A

(b) Evidentiary Effect. A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.

ADVISORY COMMITTEE'S NOTE

This rule is an adaptation of § 57a of the Act. The Federal Rules of Evidence, made applicable to bankruptcy cases by Rule 917, do not prescribe the evidentiary effect to be accorded particular documents. As indicated in the Note accompanying Rule 917, subdivision (b) of this rule supplements the Federal Rules of Evidence as they apply to bankruptcy cases.

Rule 302. Filing Proof of Claim

(a) Manner of Filing. In order for his claim to be allowed, every creditor, including the United States, any state, or any subdivi-

sion thereof, must file a proof of claim in accordance with this rule, except as provided in Rules 303 and 304.

(b) Place of Filing. A proof of claim shall be filed in the place prescribed by Rule 509.

(c) Claim Founded upon a Writing. When a claim is founded upon a writing, the original or a duplicate shall be filed with the proof of claim unless the writing has been lost or destroyed. If lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

, or an interest in property of the bankrupt securing the claim,

If a security interest in property of the bankrupt is claimed, the proof of claim shall be accompanied by satisfactory evidence that the security interest has been perfected.

(d) Transferred Claim.

(1) Unconditional Transfer Before Proof Filed. If a claim has been unconditionally transferred before proof of the claim has been filed, the proof of such claim may be filed only by the transferee. If such claim has been transferred after the filing of the petition, it shall be supported by (A) a statement of the transferor acknowledging the transfer and stating the consideration therefor or (B) a statement of the transferee why it is impossible to obtain such a statement from the transferor.

(2) Unconditional Transfer After Proof Filed. If a claim has been unconditionally transferred after proof thereof has been filed, proof of the terms of the transfer shall be filed, and the court shall immediately notify the original claimant by mail of the filing of such proof of transfer and that objection thereto, if any, must be made within 10 days of the mailing of the notice or within such further time as the court may

allow. If the court finds, after hearing if necessary, that the claim has been unconditionally transferred, it shall make an order substituting the transferee for the original claimant. If it does not so find, the court shall make such order as may be appropriate.

(3) Transfer of Claim for Security Before Proof Filed. If a claim has been transferred for security before proof of the claim has been filed, the transferor or transferee or both may file a proof of claim for the full amount. The proof shall be supported by a statement setting forth the terms of the transfer and, if the claim was so transferred after the filing of the petition, by (A) a statement of the transferor acknowledging the transfer and stating the consideration therefor, or (B) a statement of the transferee why it is impossible to obtain such a statement from the transferor. If either the transferor or the transferee files a proof of claim, the court shall immediately notify the other by mail that he may join in the claim so filed. If both transferor and transferee file proofs of the same claim, the proofs shall be consolidated. After hearing if necessary, the court shall make such orders respecting allowance and voting of the claim, payment of dividends thereon, and participation in the administration of the estate as may be appropriate.

(4) Transfer of Claim for Security After Proof Filed. If a claim has been transferred for security after proof thereof has been

filed, proof of the terms of the transfer shall be filed, and the court shall immediately notify the original claimant by mail of the filing of such proof of transfer and that objection thereto, if any, must be made within 10 days of the mailing of the notice or within such further time as the court may allow. After hearing if necessary, the court shall make such orders respecting allowance and voting of the claim, payment of dividends thereon, and participation in the administration of the estate as may be appropriate.

(e) Time for Filing. A claim must be filed within 6 months after the first date set for the first meeting of creditors, except as follows:

(1) ~~Upon~~ On application before the expiration of such period and for cause shown, the court may grant a reasonable, fixed extension of time for the filing of a claim by the United States, a state, or a subdivision thereof.

(2) In the interest of justice the court may grant an infant or incompetent person without a guardian up to an additional 6 months for filing a claim.

(3) A claim which arises in favor of a person or becomes allowable because of a judgment for the recovery of money or property from such person or because of a judgment denying or avoiding a person's ~~rights~~ interest in property may be filed within 30 days after such judgment becomes final, but if the judgment imposes a liability which is not

satisfied, or a duty which is not performed, within such period or such further time as the court may permit, the claim shall not be allowed.

(4) If notice of no dividend was given to creditors pursuant to Rule 203(b), and subsequently the payment of a dividend appears possible, the court shall notify the creditors of that fact and shall grant them a reasonable, fixed time for filing their claims of not less than 60 days after the mailing of the notice or 6 months after the first date set for the first meeting of creditors, whichever is the later.

(5) If all claims ~~duly~~ allowed have been paid in full, the court may grant a reasonable, fixed extension of time for the filing of claims not filed within the time hereinabove prescribed against any remaining surplus.

ADVISORY COMMITTEE'S NOTE

Subdivision (a) of this rule is substantially a restatement of the general requirement that claims be proved and filed as set out in the first sentence of § 57n of the Act. The exceptions refer to a new rule authorizing certain claims to be filed by the bankrupt and to a revised provision for the filing of a claim by a contingent creditor of the bankrupt.

Subdivision (b) and Rule 509~~(a)~~, to which the subdivision refers, are adapted from § 57c of the Act.

Subdivision (c) ~~is~~ derived from § 57b of the Act and the fifth sentence of General Order 21(1), but the filing of a duplicate of a writing underlying a claim authenticates the claim with the same effect as the filing of the original writing. *Cf.* Rules 1001(4) and 1003 of the ~~proposed~~ Federal Rules of Evidence. The statutory requirement of an oath is dispensed with in accordance with the

. The first two sentences of subdivision (c) are

add a requirement for the filing of any written security agreement and provide that

policy of the rules to simplify procedures and reduce costs. *Cf.* Rule 911(b) and Rule 11 of the Federal Rules of Civil Procedure. The provision of § 57b of the Act allowing withdrawal of an instrument on permission of the court is deleted as unnecessary in view of the authorization given by the rule to the filing of a duplicate in lieu of the original.

Subdivision (d) is an elaboration of General Order 21(3). The rule recognizes the differences between an unconditional transfer of a claim and a transfer for the purpose of security and prescribes a procedure for dealing with the rights of the transferor and transferee when the transfer is for security. The rule clarifies the procedure to be followed when a transfer precedes the filing of the petition as well as that required when the transfer occurs afterward. When a claim is assigned after bankruptcy but before a proof of the claim is filed, General Order 21(3) has required the proof to be accompanied by an affidavit of the assignor who owned the claim at the date of bankruptcy. The affidavit duplicates in considerable part the information required to be included in the proof of claim. The interests of sound administration are adequately served by requiring the post-bankruptcy transferee to file with his proof of claim a statement of the transferor acknowledging the transfer and the consideration for the transfer. Such a disclosure will assist the court in dealing with evils that may arise out of post-bankruptcy traffic in claims against a bankrupt estate. *Monroe v. Scofield*, 135 F.2d 725 (10th Cir. 1943); *In re Philadelphia & Western Ry.*, 64 F.Supp. 738 (E.D.Pa. 1946); *cf. In re Latham Lithographic Corp.*, 107 F.2d 749 (2d Cir. 1939). Both paragraphs (1) and (3) of this subdivision, which deal with a transfer before the filing of a proof of claim, recognize that it may be impossible to obtain the required statement from the transferor, but in that event the reason for the impossibility must accompany the proof of claim filed by the transferee.

Paragraphs (3) and (4), which are new, clarify the doubtful status of a claim transferred for the purpose of security. An assignee for security has been recognized as

The last sentence of subdivision (c) is new and, with the requirement in the first sentence for the filing of any written security agreement, is designed to facilitate the determination whether the claim is secured and properly perfected so as to be valid against the trustee. ⟶ "Satisfactory evidence" of perfection, which is to accompany the proof of claim, would include a duplicate of an instrument filed or recorded, a duplicate of a certificate of title when a security interest is perfected by notation on such a certificate, a statement that pledged property has been in the possession of the secured party since a specified date, or a statement of the reasons why no action was necessary for perfection. A secured creditor is not required to file a proof of claim under this rule if he is not seeking the allowance of a claim for a deficiency. See Rule 306(d).

a rightful claimant in bankruptcy. *Feder v. John Engelhorn & Sons*, 202 F.2d 411 (2d Cir. 1953). An assignor's right to file a claim notwithstanding the assignment was sustained in *In re R & L Engineering Co.*, 182 F.Supp. 317 (S.D.Cal. 1960). Apparently neither the assignor nor the assignee was accorded the right to file a claim assigned for security in *In re Eagles*, 99 Fed. 695 (E.D.N.C. 1900), but the facts of the case are obscure. Facilitation of the filing of proof by both claimants as holders of interests in a single claim is consonant with equitable treatment of the parties and sound bankruptcy administration. See *In re Latham Lithographic Corp.*, 107 F.2d 749 (2d Cir. 1939).

Paragraphs (2) and (4) of subdivision (d) deal with the transfer of a claim after proof thereof has been filed and are an adaptation of the second sentence of General Order 21(3). The proof of the terms of the transfer required to be disclosed to the court will facilitate the court's determination of the appropriate order to be entered on account of the transfer. The requirement of General Order 21(5) that assignments of claims after proof has been filed be "proved or acknowledged" before an officer enumerated in § 20 of the Act has been deleted as needless.

Subdivision (e) is adapted from § 57n of the Act and retains the time limits on the filing of claims established by the statutory provisions. Although the claim of a secured creditor against the bankrupt may have arisen before bankruptcy, a judgment avoiding his security may make his claim allowable for the first time after the time for filing claims generally has expired. In according the creditor in such a case a right to file his claim 30 days after the judgment against him becomes final, clause (3) of the subdivision clarifies the applicability of this exception from the 6-month limitation to a situation entirely within the ambit of the purpose of the third proviso of § 57n, from which the clause is derived. A judgment does not become final for the purpose of starting the 30-day period provided for by clause (3) until the time for appeal has expired or, if an appeal is taken, until the ap-

peal has been disposed of. *In re Tapp*, 61 F.Supp. 591 (W.D.Ky. 1945).

Clause (4) of subdivision (e) is new and is correlated with the provision in Rule 203(b) authorizing notification to creditors of estates from which no dividends are to be anticipated. The new clause permits creditors who have refrained from filing claims after receiving such a notification to be given an additional opportunity to file when subsequent developments during the administration indicate the possibility of a dividend. The notice required by this clause shall be given in the manner provided in Rule 203.

Provision is made in Rule 203(a) and (d) for notifying all creditors of the fixing of a time for filing claims against a surplus under clause (5). This clause, which is derived from the last sentence of § 57n of the Act, does not deal with the distribution of the surplus.

See also Rule 122(9).

Rule 303. Filing of Tax and Wage Claims by Bankrupt

If a creditor having a provable claim for taxes or wages fails to file his claim on or before the first date set for the first meeting of creditors, the bankrupt may execute and file a proof of such claim in the name of the creditor. The court shall forthwith mail notice of such filing to the creditor and to the trustee.

Such claim shall be treated as a filed claim only for purposes of allowance and distribution.

The creditor may nonetheless file a proof of claim pursuant to Rule 302, which proof when filed shall supersede the proof filed by the bankrupt.

ADVISORY COMMITTEE'S NOTE

It is the policy of the Act that debtors' estates should be administered for the benefit of creditors without respect to the dischargeability of their claims. After their estates have been closed, however, discharged bankrupts may find themselves saddled with liabilities, particularly for taxes, which remain unpaid because of the failure of creditors holding nondischargeable claims to file proofs of claim and receive distributions thereon. The result is

that the bankrupt is deprived of an important benefit of the Act without any fault or omission on his part and without any objective of the Act being served thereby.

This rule authorizes a bankrupt to file a proof of claim for any holder of a provable tax or wage claim. Although tax claims are not expressly included in the list of provable claims set out in § 63a of the Act, the provability of those that are due and owing at the time of bankruptcy has never been doubted. See 3 Collier ¶ 57.30 (1964); 3A *id.* ¶ 63.26 (1961). Not all tax and wage claims are nondischargeable, but it may be particularly difficult to determine whether tax claims survive discharge. See Plumb, *Federal Tax Liens and Priorities in Bankruptcy*, 43 Ref.J. 37, 43–44 (1969); 1 Collier ¶ 17.14 (1967). In order to eliminate the necessity of his resolution of this troublesome issue, the option extended the bankrupt by this rule does not depend on nondischargeability. No serious administrative problems and no unfairness to creditors are foreseen as likely to develop from adoption of this rule. The bankrupt's authority to file is conditioned on the creditor's failure to file his own proof of claim on or before the first date set for the first meeting of creditors, which is the date a claim must ordinarily be filed in order to be voted. Notice to the creditor is provided to enable him to file a proof of claim pursuant to Rule 302, which proof, when filed, would supersede the proof filed by the bankrupt. Notice to the trustee, if one has been elected or appointed, would serve to alert the trustee to the special character of the proof and the possible need for supplementary evidence of the validity and amount of the claim. If the trustee does not qualify until after a proof of claim is filed by the bankrupt pursuant to this rule, he should be notified as soon as practicable thereafter.

This rule is not intended to subject the creditor in whose name a claim is filed thereunder to the jurisdiction of the court of bankruptcy.

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Rule 301. Claim by ~~Surety for Bankrupt~~

A person who is or may be liable ~~on a debt~~ of the bankrupt, or who has secured a credi-

To the extent the claim is allowed and dividends paid on it, it will be reduced or perhaps paid in full. If the claim is also filed pursuant to Rule 304, only one distribution on it may be made. As required expressly by Rule 304 and by the purpose of this rule, such distribution must diminish the claim.

tor of the bankrupt, may, if the creditor fails to file his ~~proof of~~ claim ~~at~~ on or before the date set for the first meeting of creditors, ~~execute and~~ file a proof of claim pursuant to Rule 302 in the name of the creditor, if known, or, if unknown, in his own name. No ~~dividend~~ distribution shall be ~~paid~~ made upon the claim except upon satisfactory proof that the original debt will be diminished by the amount ~~so paid.~~ of the distribution. The creditor may nonetheless file a proof of claim pursuant to Rule 302, and such proof of claim shall supersede the proof of claim filed pursuant to the first sentence of this rule.

ADVISORY COMMITTEE'S NOTE

This rule is derived from § 57i of the Act and General Order 21(4). The Act, however, authorizes a filing procedure only by a person who has secured a creditor of the bankrupt by his "individual undertaking." The rule goes further by authorizing the same procedure to be followed when the person has secured a creditor of the estate by pledging collateral or otherwise creating a security interest in his own property, without assuming any personal obligation to the creditor. The rule also makes clear that anyone who may be liable on a debt of the bankrupt, including a surety, guarantor, indorser, or codebtor, is authorized to file in the name of the creditor of the bankrupt. See 3 Collier ¶ 57.21 (1961); Countryman, *Cases and Materials on Debtor and Creditor* 686–89 (1961). The rule assures a fair opportunity to the surety or other contingent claimant to exercise the right of filing in the name of the creditor (or in his own name if that of the creditor is unknown) by recognizing that he should not be required to wait until the last minute before the expiration of the period allowed for the filing of claims. Since filing his claim ~~at~~ on or before the first meeting of creditors is ordinarily necessary in order for a creditor to participate in the election of the trustee and the other business conducted at the meeting, conditioning the right to file under this rule on the creditor's nonfiling at or before the meeting is a reasonable accommodation of the interests of the parties and administrative convenience.

Rule 305. Withdrawal of Claim

A creditor may withdraw a claim as of right by filing a notice of withdrawal, except as provided in this rule. If, after a creditor has filed a ~~proof of~~ claim, an objection is filed thereto or a complaint is filed against him in an adversary proceeding or the creditor participates significantly in the case or receives a dividend, he may not withdraw the claim save ~~upon~~ application or motion, with notice to the trustee or receiver, and ~~upon~~ order of the court containing such terms and conditions as the court deems proper.

Advisory Committee's Note

Since 1938 it has generally been held that Rule 41 of the Federal Rules of Civil Procedure governs the withdrawal of a proof of claim. *In re Empire Coal Sales Corp.*, 45 F.Supp. 974, 976 (S.D.N.Y.), aff'd sub nom. *Kleid v. Ruthbell Coal Co.*, 131 F.2d 372, 373 (2d Cir. 1942); *Kelso v. Mecklaren*, 122 F.2d 867, 870 (8th Cir. 1941); *In re Hills*, 35 F.Supp. 532, 533 (W.D.Wash. 1940). Accordingly it was ruled in the cited cases that a proof of claim may be withdrawn only subject to approval by the court after an objection has been filed. This constitutes a restriction of the right of withdrawal as recognized by some though by no means all of the cases antedating the promulgation of the Federal Rules of Civil Procedure. See 3 Collier ¶ 57.12 (1961); Note, 20 Best.U.L.Rev. 121 (1940).

The filing of a claim does not commence an adversary proceeding under these rules, but the filing of an objection to the claim ~~against the claimant~~ initiates a contest that must be disposed of by the court. This rule recognizes the applicability of the considerations underlying Rule 11(a) of the Federal Rules of Civil Procedure to the withdrawal of a

claim after it has been put in issue by an objection. Rule 41(a)(2) of the Federal Rules of Civil Procedure provides for a bar to dismissal over the objection of a defendant who has pleaded a counterclaim prior to the service of the plaintiff's motion to dismiss. Although the applicability of this provision to the withdrawal of a claim was assumed in *Conway v. Union Bank of Switzerland*, 201 F.2d 603, 608 (2d Cir. 1953), *Kleid v. Ruthbell Coal Co., supra*, *Kelso v. Maclaren, supra*, and *In re Hills, supra*, this rule vests discretion in the court to grant, deny, or condition the request of a creditor to withdraw, without regard to whether the trustee has filed a merely defensive objection or a complaint seeking an affirmative recovery of money or property from the creditor.

A number of pre-1938 cases sustained denial of a creditor's request to withdraw his proof of claim on the ground that he had estopped himself or made an election of remedies. 2 Remington, *Bankruptcy* 186 (Henderson ed. 1956); *cf.* 3 Collier 201 (1961). Voting his claim in an election of a trustee was an important factor in the denial of a request to withdraw in *Standard Varnish Works v. Haydock*, 143 Fed. 318, 319–20 (6th Cir. 1906), and *In re Cann*, 47 F.2d 661, 662 (W.D.Pa. 1931). And it has frequently been recognized that a creditor should not be allowed to withdraw his claim once he has accepted a dividend. *In re Friedman*, 1 Am.B.R. 510, 512 (Ref., S.D.N.Y. 1899); 3 Collier 205 (1964); *cf. In re O'Gara Coal Co.*, 12 F.2d 426, 429 (7th Cir.), cert.denied, 271 U.S. 683 (1926). It was held in *Industrial Credit Co. v. Hazen*, 222 F.2d 225 (8th Cir. 1955), however, that although a claimant had participated in the first meeting of creditors and in the examination of witnesses, he was entitled under Rule 11(a)(1) of the Federal Rules of Civil Procedure to withdraw his claim as of right when he filed a notice of withdrawal before the trustee filed an objection under § 57g of the Act. While this rule incorporates the post-1938 case law referred to in the first paragraph of this note, it rejects the implication drawn in the *Hazen* case that Rule 11(a) of the Federal Rules of Civil Procedure supersedes the pre-1938 case law that vests discretion in the court to deny or restrict with-

drawal of a claim by a creditor on the ground of estoppel or election of remedies. While purely formal or technical participation in a case by a creditor who has filed a claim should not deprive him of a right to withdraw his claim, a creditor who has accepted a dividend or who has voted in the election of a trustee or otherwise participated actively in proceedings in a case should be permitted to withdraw only with the approval of the court on terms deemed appropriate by it after notice to the trustee or receiver. 3 Collier 205–06 (1964).

Rule 306. Objections to and Allowance of Claims for Purpose of Distribution; Valuation of Security

(a) Trustee's Duty to Examine and Object to Claims. The trustee shall examine proofs of claim and object to the allowance of improper claims, unless no purpose would be served thereby.

(b) Allowance When No Objection Made. Subject to the provisions of subdivision (d) of this rule, a claim filed in accordance with Rule 302, 303, or 304 shall be deemed allowed for the purpose of distribution unless objection is made by a party in interest.

Objection

(c) ~~Objections~~ to Allowance. An objection to the allowance of a claim for the purpose of distribution shall be in writing. A copy of the objection and notice of a hearing thereon shall be mailed or delivered to the claimant. If ~~the trustee joins with his~~ objection to a claim is joined with a demand for relief of the kind specified in Rule 701, the proceeding thereby becomes an adversary proceeding.

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is joined with a demand

(d) Secured Claims. If a secured creditor files a proof of claim, the value of the secu-

rity held by him as collateral for his claim shall be determined by the court, and the claim shall be allowed only to the extent it is enforceable for any excess of the claim over such value.

ADVISORY COMMITTEE'S NOTE

Subdivision (a) is derived from § 47a(8) of the Act. The last clause recognizes that the trustee and the court should not be burdened by the making and consideration of objections to claims when the disposition of the objection can have no consequence in the administration of the estate.

Subdivision (b) relieves the court of the substantial burden of making formal orders of allowance of claims to which no objection is made. The automatic allowance effected by the rule is only for the purpose of distribution and does not constitute a determination as to the amount or validity of the claim for any other purpose.

Subdivision (c) prescribes the manner in which an objection to a claim shall be made and notice of the hearing thereon given to the claimant. The contested matter initiated by an objection to a claim is governed by Rule 914, unless a counterclaim by the trustee is joined with the objection to the claim. The filing of a counterclaim ordinarily commences an adversary proceeding subject to the rules in Part VII. While the bankrupt's other creditors may make objections to the allowance of a claim, the demands of orderly and expeditious administration have led to a recognition that the right to object is generally centered in the trustee as provided in subdivision (a). 3 Collier ¶ 57.17 [2.2] (1961). Section 57f of the Act, requiring objections to claims to be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit, is omitted since these considerations govern all proceedings and matters in bankruptcy cases. See Rule 903.

By virtue of the automatic allowance a dividend may be paid on a claim which may thereafter be disallowed

on objection made pursuant to subdivision (c). The amount of the dividend paid before the disallowance in such event would be recoverable by the trustee in an adversary proceeding brought pursuant to § 57l of the Act.

Subdivision (d) is a restatement of § 57h of the Act. The court may utilize any of the modes for determining the value of security specified in that subdivision or any other method it deems appropriate.

Rule 307. Reconsideration of Claims

A party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate. If the motion is granted, the court may after hearing ~~upon~~ notice make such further order as may be appropriate.

ADVISORY COMMITTEE'S NOTE

This rule is a substantial revision of § 57k of the Act and General Order 21(6). Because these provisions have spoken only of the reconsideration of claims that have been allowed, it has sometimes been held that a referee has no jurisdiction to reconsider a disallowed claim, or the amount or priority of an allowed claim, at the instance of the claimant himself. See, *e.g., In re Gouse,* 7 F.Supp. 106 (M.D.Pa. 1934); *In re Tomlinson & Dye, Inc.,* 3 F.Supp. 800 (N.D. Okla. 1933). This view disregarded § 2a(2) of the Act and the "ancient and elementary power" of a referee as a court to reconsider any of his orders. *In re Pottasch Bros. Co., Inc.,* 79 F.2d 613, 616 (2d Cir. 1935); *Castaner v. Mora,* 234 F.2d 710 (1st Cir. 1956). This rule recognizes the power of the court, including a referee, to reconsider an order of disallowance on appropriate ~~application~~ motion.

Reconsideration of a claim which has been previously allowed or disallowed after objection is discretionary with the court. The right to seek reconsideration of an

allowed claim, like the right to object to its allowance, should be recognized to rest in the trustee if one has qualified and is performing the duties of his office with reasonable diligence and fidelity. A request for ~~consider~~ reconsider-ation of a disallowance would, on the other hand, ordinarily come from the claimant, the only party likely to have a sufficient interest to make the motion.

A proof of claim executed and filed in accordance with the rules in this Part III is prima facie evidence of the validity and the amount of the claim notwithstanding a motion for reconsideration of an order of allowance. Failure to respond constitutes no admission, though it may be deemed a consent to a reconsideration. *In re Goble Boat Co.*, 190 Fed. 92 (N.D.N.Y. 1911). The court may decline to reconsider an order of allowance or disallowance without notice to any adverse party and without affording any hearing to the movant. If a motion to reconsider is granted, notice and hearing must be afforded to parties in interest before the previous action taken in respect to the claim may be vacated or modified. After reconsideration, the court may allow or disallow the claim, increase or decrease the amount of a prior allowance, accord the claim a priority different from that originally assigned it, or enter any other appropriate order.

The rule does not retain the limitation imposed by § 57k of the Act that apparently forecloses reconsideration after the case has been closed. Authorities have disagreed as to whether reconsideration may be had after a case has been reopened. Compare 3 Collier ¶ 364 (1964), with 2 Remington, *Bankruptcy* 498 (Henderson ed. 1956). If a case is reopened as provided in Rule 515, reconsideration of the allowance or disallowance of a claim may be sought and granted in accordance with this rule. With respect to a distribution previously made, the allowance of a claim on such reconsideration would have the effect prescribed by § 65c of the Act. On disallowance after reconsideration the trustee may recover dividends previously paid on the claim, as provided in § 57l of the Act.

Rule 308. Declaration and Payment of Dividends

Dividends to creditors shall be paid as promptly as practicable in such amounts and at such times as the court may order. Dividend checks shall be made payable and mailed to each creditor whose claim has been allowed, unless a power of attorney authorizing another person to receive dividends has been executed and filed in accordance with Rule 910. In that event, unless a local rule or court order provides otherwise, dividend checks shall be made payable to the creditor and to such other person and shall be mailed to such other person.

Advisory Committee's Note

The first sentence of this rule consolidates and considerably simplifies provisions found in §§ 39a(5), 47a(11), and 65b of the Act. The preparation of records showing dividends declared and to whom payable is subject to prescription by the Director of the Administrative Office pursuant to Rule 504(a). The rule, like the statutory provisions from which it is derived, governs distributions to creditors having priority as well as to general unsecured creditors. See 3A Collier ¶ 65.02 (1964). Notwithstanding the detailed statutory provisions regulating the declaration of dividends, a necessarily wide discretion over this matter has been recognized to reside in the court ~~in view of the fact that the amount of many administrative expense claims cannot be determined until the case is ready to be closed, that proofs of claim may be amended after they have been filed, and the existence of disputed, unliquidated, and contingent claims frequently dictates caution to avoid premature and excessive distributions that may have to be recovered~~. See 3A Collier, *supra* ¶ 65.03; 1 *Proceedings of Seminar for Newly Appointed Referees*

in Bankruptcy 173 (1964). Although the rule leaves to the discretion of the court the amounts and the times of dividend payments, it recognizes the creditors' right to as prompt payment as practicable.

The second and third sentences of the rule make explicit the method of payment of dividends and afford protection of the interests of the creditor and the holder of a power of attorney authorized to receive payment.

Rule 309. Small Dividends

The court may by local rule or order direct that no dividend for less than $1 shall be distributed by the trustee to any creditor. Any such dividend shall be treated in the same manner as unclaimed money as provided in Rule 310.

Advisory Committee's Note

This rule permits a court to eliminate the disproportionate expense and inconvenience incurred by the issuance of a dividend check of less than $1. Creditors are typically more irritated than pleased to receive such small dividends, but the money is held subject to their specific request as are unclaimed dividends under § 66 of the Act. At the same time the trustee makes payment of undistributed dividends to the clerk of the district court pursuant to a direction in accordance with this rule, he should file with the clerk a list of the names and addresses, so far as known, of the persons entitled to the money so paid in and the respective amounts payable to them.

Rule 310. Unclaimed Funds

Sixty days after the distribution of the final dividend, the trustee shall stop payment of all checks then unpaid and file with the clerk of the district court a list of the

names and addresses, so far as known, of the persons entitled to such payments and the amounts thereof. The unclaimed funds shall thereupon be deposited in the registry of the United States district court and shall be withdrawn as provided in Title 28, U.S.C., § 2042.

ADVISORY COMMITTEE'S NOTE

This rule is derived from § 66 of the Act. The provision of the Act that the unclaimed money so deposited shall not be subject to escheat under the laws of any state is a rule of substantive law not appropriate for inclusion in the rule.

PART IV. THE BANKRUPT: DUTIES AND BENEFITS

Petition

Rule 401. ~~Adjudication~~ as Automatic Stay of Certain Actions on Unsecured Debts

(a) Stay of Actions. ~~An adjudication~~ shall operate as a stay of any action ~~then pending or thereafter commenced~~ against the bankrupt, or the enforcement of any judgment against him, if the action or judgment is founded on an unsecured provable debt other than one not dischargeable under clause (1), (5), (6), or (7) of § 17a of the Act.

The filing of a petition

the commencement or continuation of

(b) Duration of Stay. Except as it may be terminated, annulled, or modified by the bankruptcy court under subdivision (c), (d), or (e) of this rule, the stay shall continue until the bankruptcy case is dismissed or the bankrupt is denied a discharge or waives or otherwise loses his right thereto.

(c) Annulment of Stay ~~Against Unscheduled Creditor~~. At the expiration of 30 days after the first date set for the first meeting of creditors, the stay provided by this rule shall be deemed annulled as against any creditor whose debt has not been duly scheduled and who has not filed his claim by that time.

(d) Relief from Stay. Upon the filing of a complaint by a creditor seeking relief from a stay provided by this rule, the bankruptcy ~~judge~~ shall set the trial ~~date~~ for the earliest possible ~~time~~, and it shall take precedence

court

date

over all matters except older matters of the same character. The court may, for cause shown, terminate, annul, ~~or~~ modify such stay.

, or condition

(e) Availability of Other Relief. Nothing in this rule precludes the issuance of, or relief from, any stay, ~~injunction, or~~ restraining order when otherwise authorized.

or injunction

ADVISORY COMMITTEE'S NOTE

This rule supplements and reinforces the policy of §§ 11a, 14f(2), and 17c(4) of the Act. Section 11a provides in terms for a mandatory stay until adjudication or dismissal of the petition of all actions founded on dischargeable debts which are pending against the bankrupt when the petition is filed. This statutory provision has been further held to authorize stay of the enforcement by levy of execution or otherwise of a judgment on a dischargeable debt against the bankrupt. 1 Collier ¶ 11.03 (1960). As a matter of comity application for the stay has frequently been made heretofore to the court where the action is pending, but the Act and the case law do not recognize any discretion in the court to deny or condition the stay against creditors holding dischargeable debts. *Id.* ¶¶ 11.05, 11.08.

By amendatory legislation in 1970, Congress substantially extended the protection of a bankrupt against actions by his creditors well beyond the limits of § 11a. Section 17c(4) now authorizes the bankruptcy court to enjoin any creditor from instituting or continuing an action on any debt, whether or not dischargeable and ~~after as well as before~~ adjudication. This provision is correlated with two other amendments of the Act protective of bankrupts: (1) Paragraphs (1) and (2) of § 17c provide for a determination of the issue of dischargeability of any debt by the bankruptcy court and for the determination of any issues remaining after it determines that any debt is nondischargeable; and (2) section 14f(2) requires

whether before or after

All creditors receive notice of the effect of the petition as a stay along with notice of the first meeting of creditors (see Official Form No. 12). The bankruptcy court may appropriately also give notice of the stay to the judge or other officer of a nonbankruptcy court in which an action subject to the stay is known to be pending, particularly when there appears to be a likelihood that action in disregard of the stay may occur.

that an order of discharge enjoin all creditors whose debts are discharged from thereafter instituting or continuing any action or employing any process to collect such debts as personal liabilities of the bankrupt.

Subdivision (a). This rule relieves the bankrupt from the necessity of filing an application for a stay or an injunction against the institution or continuation of any action on a dischargeable debt or of one not dischargeable under § 17a(2), (3), (4), or (8) of the Act. The stay provided by the rule protects the bankrupt and relieves other courts from pointless and needless litigation. The rule provides an expedited procedure in subdivision (d) for determining the propriety of granting relief from the stay where a special justification exists—*e.g.*, to allow an unliquidated claim to be determined by judgment in a pending action, as in *In re Gerstenzang*, 52 F.2d 863, 864 (S.D.N.Y. 1931), or to enable the creditor to satisfy a condition to the enforcement of the claim against a surety, as in *Manufacturers' Finance Corp. v. Vye-Neill Co.*, 46 F.2d 136 (D.Mass. 1930), aff'd, 62 F.2d 625, 628 (1st Cir.), cert.denied, 289 U.S. 738 (1933).

The premise of the provision for staying actions and enforcement of judgments on debts excepted by clauses (2), (4), and (8) of § 17a of the Act from discharge is the same as that underlying § 17c(2) of the Act. As pointed out in Sen. Rep. No. 91–1173, 91st Cong., 2d Sess. 2, 4 (1970), bankrupts have been harassed by creditors who file actions against their debtors notwithstanding the bankruptcy, in the hope and expectation that default judgments will be entered. Section 17c of the Act undertakes to correct this abuse while recognizing the rights of creditors to prompt adjudication of their rights by conferring jurisdiction on the bankruptcy court to determine the dischargeability of any debt under § 17a of the Act. The jurisdiction of the bankruptcy court to make this determination is exclusive with respect to debts alleged to come within clauses (2) and (4) of § 17a and, subject to a limited exception, within clause (8) of § 17a of the Act. The abuse intended to be dealt with by Congress arose in large part as a result of creditors' actions and efforts to enforce judgments on debts alleged

in postbankruptcy complaints to be nondischargeable under § 17a(2). Indeed, dischargeability under this clause typically depends on the resolution of questions of fact that conceivably could be raised in almost any action or in respect to almost any judgment on a contract claim against the bankrupt. *Cf. Hisey v. Lewis-Gale Hospital, Inc.*, 27 F.Supp. 20, 27 (WD.Va. 1939). A stay of the creditors from proceeding outside of the bankruptcy court on debts alleged to come within § 17a(2), (4), and (8) protects the bankrupt from harassment and frustration of the benefits intended to be assured by the enactment of § 17c(2). A creditor who contends that his debt is not discharged under § 17a(8) is not subject to the filing requirement of § 17c(2) if there is a right to jury trial and a jury trial has been or will be demanded. Since the special situation contemplated by this reference to a jury trial can hardly arise except in a pending action for an intentional tort that will support a contractual or quasicontractual claim or in a pending action for negligence, the instances when a court other than the bankruptcy court can determine dischargeability of a debt under § 17a(8) will be infrequent. Although in such an eventuality the creditor may request relief from the stay under subdivision (d), the bankrupt's right to seek an injunction under § 17c(4) is also recognized by subdivision (e).

Subdivision (c). The exception for debts not dischargeable under § 17a(3), *viz.*, those not scheduled in time for proof and allowance, involves considerations different from those discussed in the preceding paragraph. Even though a debt is not listed in the schedules as originally filed, it cannot be said to be nondischargeable unless, without the creditor's notice or actual knowledge, the case has progressed so far in the course of its administration that it is too late for the omitted creditor to prove his claim and avail himself of an equal opportunity with other creditors to participate in the administration of the affairs of the estate. See *In re Beeman*, 112 Fed. 662, 663 (N.D.Ga. 1901); 1 Collier 1149 (1969); *id.* ¶ 17.23 (1967). Subdivision (c) rests on the assumption that if a debt remains unlisted for 30 days after the

first date set for the first meeting of creditors, it is then unlikely that the omitted creditor will have an opportunity to participate effectively in the administration and the stay provided by this rule is accordingly deemed annulled. As recognized by subdivision (e), the bankrupt may nevertheless be able to obtain a stay or an injunction under the Act.

Subdivision (d). A creditor who is subject to the stay of this rule may obtain relief therefrom in appropriate cases by filing a complaint in the court. The adversary proceeding thereby commenced is governed by the rules in Part VII subject to the requirement of subdivision (d) of this rule that the trial ~~date~~ be set for the earliest possible ~~time~~ and given precedence over all other matters not of the same character. As noted in the previous paragraph, a stay against an omitted creditor is annulled at the end of 30 days following the first date set for the first meeting of creditors. If he should seek relief from the stay before the lapse of that period, he would disclose his knowledge of the bankruptcy and thereby substantially undermine his request for relief.

date

Subdivision (e). As subdivision (e) recognizes, the right of the bankrupt under § 11a or § 17c(4) of the Act to obtain an injunction against the institution or continuance of an action on a debt against him is not affected by this rule. Such relief may be sought by answer to a complaint of the creditor filed under subdivision (d) of this rule as well as by a complaint. See Rules 701, 713, and 765. The court may terminate, annul, ~~or~~ modify the stay provided by this rule in any proceeding brought for the purpose of obtaining such relief or of obtaining an injunction or restraining order against an action or the enforcement of a judgment that is subject to the stay. Annulment may be appropriate where a judgment on a nondischargeable debt has been inadvertently entered or enforced notwithstanding the stay. Since the stay provided by this rule does not operate with respect to any action, or the enforcement of any judgment, on a debt excepted from discharge by clause (1), (5), (6), or (7) of the Act, the stay is not likely to be affected by proceedings brought for the purpose of obtaining a determination that a debt is not dischargeable under one of these clauses.

, or condition

The premise of this rule is that in the usual case actions on dischargeable debts and on debts alleged to be nondischargeable under § 17a(2), (3), (4), and (8) should be stayed in the interest of protecting the bankrupt's right to his discharge. See *Hisey v. Lewis-Gale Hospital, Inc.*, 27 F.Supp. 20, 26 (W.D.Va. 1939); *In re Nichols*, 22 F.Supp. 691, 695 (W.D.Ky. 1938); *In re DeLauro*, 1 F.Supp 678, 680 (D.Conn. 1932); *In re Nuttall*, 201 Fed. 557, 559 (S.D.N.Y. 1912). The rule not only relieves the bankrupt against the risk of failing to seek timely relief against creditors' actions but eliminates the need for litigation of the right to a stay in the usual case. While the initiative for bringing the issue of the right to a stay is shifted from the bankrupt to the creditor, facts providing a justification for modifying the stay will ordinarily be more easily provable by the creditor than disprovable by the bankrupt. The rule does not supersede § 11a or § 17c of the Act or restrict the discretion of the court as a court of equity to grant relief to any party.

Rule 102. Duties of Bankrupt

In addition to performing other duties prescribed by these rules, the bankrupt shall (1) attend and submit to an examination at the first meeting of creditors and at such other times as ordered by the court; (2) attend at the hearing ~~upon~~ on a complaint objecting to his discharge and, if called as a witness, testify with respect to the issues raised ~~by the pleadings~~; (3) if he has not yet filed a schedule of property pursuant to Rule 108, immediately inform the receiver, or, if no receiver is appointed, the trustee, in writing as to the location of real property ~~he owns~~ in which he has an interest and the name and address of every person holding money or property subject to his

withdrawal or order; (4) if the court directs, file a statement of the executory contracts, including unexpired leases, to which he is a party; (5) cooperate with the receiver, if any, and the trustee in the preparation of an inventory, the examination of proofs of claim, and the administration of the estate; and (6) comply with all orders of the court.

ADVISORY COMMITTEE'S NOTE

Together with Rule 108, which adapts the provisions of § 7a(8) and (9) of the Act, and Rule 205, which incorporates the provisions of § 7a(10) of the Act, this rule imposes substantially all the duties prescribed for the bankrupt by § 7a of the Act. Clause (3) of this rule is an implementation of the provisions of Rule 602, and clause (4) authorizes the court to facilitate compliance with Rule 607 by requiring a bankrupt to make the disclosures respecting his executory contracts ~~already~~ required of debtors under Chapters XI, XII, and XIII. See §§ 324(1), 424(1), and 624(1) of the Act.

heretofore

But cf. Chapter XIII Rule 13-502(3).

Rule 403. Exemptions

(a) Claim of Exemptions. A bankrupt shall claim his exemptions in the schedule of his property required to be filed by Rule 108.

(b) Trustee's Report. The trustee shall examine the bankrupt's claim for exemptions, set apart such as are lawfully claimed and allowable, and report to the court the items set apart, the amount or estimated value of each, and the exemptions claimed that are not allowable. The report shall be filed with the court no later than 15 days after the trustee qualifies. If the trustee reports that

any exemption claimed is not allowable, he shall forthwith mail or deliver copies of the report to the bankrupt and his attorney.

(c) Objections to Report. Any creditor or the bankrupt may file objections to the report within 15 days after its filing, unless further time is granted by the court within such 15-day period. Copies of the objections so filed shall be delivered or mailed to the trustee and, if the objections are by a creditor, to the bankrupt and his attorney. After hearing upon notice the court shall determine the issues presented by the objections. The burden of proof shall be on the objector.

(d) Procedure if No Trustee Qualified. If no trustee has qualified, ~~the duties of the trustee prescribed by subdivision (b) shall be performed by the bankruptcy judge within 15 days after the first meeting of creditors.~~ If the bankrupt files objections to the report, the court shall appoint a trustee or receiver, , who shall represent the estate in the hearing on the objections.

the bankruptcy judge shall file the report prescribed by subdivision (b) of this rule within 15 days after the first date set for the first meeting of creditors.

(e) Approval of Report if No Objections. If no objections are filed within the time provided by this rule, the ~~court shall forthwith approve the report as filed~~. report shall be deemed approved by the court. On request, the court may, at any time and without reopening the case, enter an order approving the report.

(f) Claim of Exemption by Person Other Than Bankrupt. If the bankrupt fails to claim the exemptions to which he is entitled, or if he dies before his exemptions have been set apart to him, his spouse, dependent children, or any other persons who are entitled to claim the exemptions allowable to the bankrupt may, within such time as the court may order, file a claim for his exemptions or object to the report.

ADVISORY COMMITTEE'S NOTE

Subdivision (a) of this rule comes from § 7a(8) of the Act.

Subdivision (b) is derived from § 47a(6) of the Act and General Order 17(2). The time allowed the trustee for filing the report of the exemptions set apart to the bankrupt is extended to 15 days following the trustee's qualification in recognition of the fact that the 5-day period prescribed by the general order generates an excessive number of requests for extension. If the bankrupt needs more prompt determination of his right to exemptions, he may request expedition of the report by the trustee under Rule 906(c). The requirement for delivery of a copy of a report denying a claim of exemption to the bankrupt and his attorney is added by the last sentence of the subdivision to assist them in making a timely decision on whether to appeal.

Subdivision (c) of the rule is an elaboration of the last clause of General Order 17(2). The 10-day period allowed by the general order for the filing of objections to the trustee's report has been enlarged to 15 days, but the time cannot be extended under the rule after the expiration of the 15-day period. The allocation of the burden of proof made by the last sentence of subdivision (c) rests on the assumption that the trustee has performed the duties imposed on him by subdivision (b) with due regard to the rights of the bankrupt as well as the creditors whom he represents. Although the assumption might be questioned by the bankrupt, the case law has generally placed the burden of proof on the bankrupt whenever there is an issue raised as to his right to an exemption claimed. *In re Dedrick*, 91 F.2d 646, 650 (10th Cir. 1937); *In re Campbell*, 124 Fed. 417, 421–22 (W.D.Va. 1903); *In re Stinemetz*, 38 Am.B.R. (N.S.) 544, 547 (Ref., D.Kans. 1938); 1 Collier ¶ 6.23 (1960). In view of the centering of the responsibility in the trustee to act generally on behalf of the creditors, ~~however~~, it is not unfair to them and is consonant with principles of sound administration to require any objector to the report to

carry the burden of sustaining his objection. See 3 Remington, *Bankruptcy* 177 (Henderson ed. 1957). But see *In re Campbell*, 124 Fed. 417, 421–22 (W.D.Va. 1903).

Subdivision (d). The procedure prescribed in subdivision (d) for a case in which there is no trustee is an adaptation of that approved in *Smalley v. Laugenour*, 196 U.S. 93 (1905). See 1 Collier, *supra* ¶ 6.21. The last sentence of the subdivision recognizes that if there are objections by the bankrupt or other beneficiary of the exemption law to a report made by the bankruptcy judge under this rule the adversary character of the matter requires the appointment of a trustee or receiver to represent the interests of the estate. Rule 209(b) governs the appointment of a trustee, and Rule 201(a)(3) has particular reference to the appointment of a receiver in the kind of situation contemplated in this subdivision. If a creditor objects to the report of the bankruptcy judge, no trustee or receiver need be appointed, since the creditor may represent the interests of the estate and the bankrupt may defend the report insofar as it would allow his claim to exemptions.

SEE ATTACHED SHEET

~~*Subdivision (e) makes explicit an implication of § 2a(11) of the Act and the last clause of General Order 17(2). See 3 Remington, supra at 177; cf. In re Garman, 226 Fed. 861, 862 (D.Md. 1915); In re Herrin & West, 215 Fed. 250, 252 (N.D.Ga. 1914).~~

Subdivision (f) spells out the procedure to be followed by persons other than the bankrupt entitled to claim exemptions under the case law construing § 6 of the Act and under the proviso of § 8. It adopts the approach of the courts in allowing considerable flexibility in procedure to protect the bankrupt's spouse and other beneficiaries of the exemption laws against prejudice resulting from the failure of the bankrupt to make a timely application in his schedule. See, *e.g.*, *In re Youngstrom*, 153 Fed. 98 (8th Cir. 1907) (bankrupt left state before bankruptcy; wife allowed to claim exemption when trustee was proceeding to sell property); *In re Edelman*, 172 F.Supp. 200, 202 (E.D.N.Y. 1959) (wife of bankrupt allowed to claim wage exemption for benefit of family

Subdivision (e) recognizes that if no timely objection is filed to the report of exemptions, there is no issue before the court, and the bankrupt's right to the exemptions set apart in the report should not await further action of the court. See In re Campbell, 124 Fed. 417, 421-22 (W. D. Va. 1903); Taylor Co. v. Williams, 139 Ga. 581, 77 S. E. 386 (1913). The rule relieves the court of the formality of making an order of approval unless requested by a party and enables the party to obtain a formal order of approval after a case is closed without the necessity of reopening the case.

when trustee sought to compel turnover of deposit in her name which contained funds derived from bankrupt's wages); *In re Maxson*, 170 Fed. 356 (N.D.Iowa 1909) (husband allowed to claim exemption by "petition" 6 months after wife's bankruptcy notwithstanding her failure to claim exemption in schedule); *In re Luby*, 155 Fed. 659 (S.D.Ohio 1907) (wife of absconding bankrupt allowed to file claim for exemption before property sold by trustee). The court retains discretion under the subdivision, however, to refuse to entertain a claim for exemption because of the laches of the party asserting the claim or for other good cause. See, *e.g.*, *In re Burnham*, 202 Fed. 762, 765–66 (W.D.Wash. 1913) (homestead claimed by wife of bankrupt denied when delay of over 3 years in making claim was not due to inadvertence).

Rule 404. Grant or Denial of Discharge

(a) Time for Filing Complaint Objecting to Discharge. The court shall make an order fixing a time for the filing of a complaint objecting to the bankrupt's discharge under § 14c of the Act. The time shall be not less than 30 days nor more than 90 days after the first date set for the first meeting of creditors, except that if notice of no dividend is given pursuant to Rule 203(b), the court may fix such time as early as the first date set for the first meeting of creditors.

(b) Notice. The court shall give at least 30 days' notice of the time fixed for filing a complaint objecting to the bankrupt's discharge under § 14c of the Act except that only 10 days' notice is required if notice of no dividend is given under Rule 203(b). Such notice shall be given to all creditors ~~and the district director of internal revenue~~ in the

manner provided in Rule 203, and to the trustee and his attorney, if any, to their respective addresses as filed with the court.

(c) Extension of Time. The court may for cause, ~~upon~~ its own initiative or ~~upon~~ application of any party in interest, extend the time for filing a complaint objecting to discharge.

(d) Grant of Discharge. ~~Upon~~ On expiration of the time fixed for filing a complaint objecting to discharge, the court shall forthwith grant the discharge unless (1) a complaint objecting to the discharge has been filed, (2) the bankrupt has filed a waiver under Rule 405, (3) it appears that the bankrupt has failed to attend and submit himself to examination at the first meeting of creditors or at any meeting specially called for his examination, or (4) the prescribed filing fees have not been paid in full.

(e) Applicability of Rules in Part VII. A proceeding commenced by a complaint objecting to discharge is governed by the rules in Part VII.

(f) Order of Discharge. An order of discharge shall ~~declare that~~ conform substantially to Official Form No. 24.

~~(1) any judgment theretofore or thereafter obtained in any court other than this court is null and void as a determination of the personal liability of the bankrupt with respect to any of the following: (A) debts dischargeable under § 17a or b of the Act; (B) debts discharged under § 17c(2) of the Act; and (C) debts determined to be discharged under § 17c(3) of the Act; and~~

~~(2) all creditors whose debts are discharged are enjoined from instituting or continuing any action or employing any process to collect such debts as personal liabilities of the bankrupt.~~

(g) Registration in Other Districts. An order of discharge that has become final may be registered in any other district by filing in the office of the clerk of the district court of that district a certified copy of the order and when so registered shall have the same effect as an order of the court of the district where registered and may be enforced in like manner.

(h) Notice of Discharge. Within 45 days after an order of discharge becomes final, the court shall mail a copy of ~~the~~ order ~~of discharge~~ to the persons ~~named~~ in subdivision (b) of this rule.

such

specified

ADVISORY COMMITTEE'S NOTE

Subdivisions (a), (b), and (c) of this rule are adaptations of the provisions of §§ 14b(1) and 58b of the Act that pertain to the procedure for determining whether a discharge will be granted. The except clauses of the last sentence of subdivision (a) and the first sentence of subdivision (b) are correlated with provisions of Rule 203(b) and 302(e)(1) designed to facilitate the administration of estates when no dividend is anticipated. The time fixed by the court under subdivision (a) may be enlarged as provided in subdivision (c) and Rule 906(b).

The notice referred to in subdivision (b) is required to be given by mail and addressed to creditors ~~and the district director of internal revenue~~ as provided in Rule 203. The provision of § 58b of the Act for notice to the United States attorney of the time for filing objections

An extension granted on an application pursuant to subdivision (c) of the rule would ordinarily redound to the benefit only of the applicant, but the scope and effect of the extension would in any event depend on the terms of the extension.

to discharge has not been carried into the rule because of the ineffectualness of such a routine notice to serve its purpose of alerting that officer to the possible need for him to file a complaint objecting to the discharge. When the circumstances indicate the appropriateness of calling on the United States attorney to take an interest in the question of a bankrupt's discharge, the court may act under § 14d of the Act. See also 18 U.S.C. § 3057.

Subdivision (d) of this rule is a revision of the first clause of § 14b(2) of the Act. If a complaint objecting to discharge is filed, the court's grant or denial of the discharge will be entered at the conclusion of the proceeding as a judgment in accordance with Rule 921. The inclusion of the clauses in subdivision (d) qualifying the duty of the court to grant a discharge when a waiver has been filed and when the bankrupt has failed to attend or submit to an examination is in accord with the construction of the Act. 1 Collier ¶ 14.16 (1966). If the bankrupt has failed to attend or submit to an examination, the court will ordinarily proceed under Rule 406 to determine whether he shall be deemed to have waived his right to dicharge. As pointed out in the Note accompanying Rule 406, however, the court may proceed to determine whether the discharge should be denied on a ground specified in § 14c of the Act. The prohibition by clause (4) of subdivision (d) on the grant of a discharge to a bankrupt before the filing fees have been paid preserves a limitation embodied in the first clause of § 14b(2) of the Act.

Subdivision (e). An objection to discharge is now required to be made by a complaint, which initiates an adversary proceeding as provided in Rule 703. The requirements of the second sentence of § 58b of the Act respecting notice of the hearing upon objections to the bankrupt's discharge are superseded by Rules 704, 705, 712, and the other rules of Part VII which govern adversary proceedings.

Subdivision (f). Official Form No. 24, to which subdivision (f) refers, includes the provisions which are required by § 14f of the Act to be set out in the order of discharge.

~~*Subdivisions (f), (g), and (h) are based on* § 14f, g, and h of the Act. The order of discharge should conform substantially to Official Form No. 24.~~ Registration may facilitate the enforcement of the order of discharge in a

Subdivision (g) is based on § 14g of the Act.

district other than that in which it was entered. See 2 Moore ¶ 1.04[2] (1967). Because of the extraterritorial service of process authorized by Rule 701, however, registration of the order of discharge is not necessary under these rules to enable a discharged bankrupt to obtain relief against a creditor proceeding in any district of the United States in disregard of the injunctive provisions of the order of discharge. ~~Subdivision (h) omits the requirement of § 14h of the Act~~ that notice be given of the debts determined by the court to be nondischargeable and of the debts as to which proceedings to determine dischargeability are pending. The bankrupt and every creditor whose debt is the subject matter of any proceeding to determine dischargeability will otherwise have had notice of its pendency or disposition. Parties other than the bankrupt and the creditor whose debt is involved have no sufficient need of notice of the pendency or determination of such proceedings to warrant inclusion of this information in the notice of discharge required by subdivision (h). The debts to be specified in the notice required by § 14h of the Act could not in any event purport to be a complete list of the debts that may be nondischargeable.

Subdivision (h) is based on § 14h of the Act but omits its re-

Rule 403. Waiver of Discharge

Any bankrupt may waive his right to discharge by a writing filed with the court.

Advisory Committee's Note

This rule is an adaptation of the first sentence of the proviso of § 14a of the Act. The rules eliminate the fiction that the adjudication operates as an application for a discharge, and no distinction is made between corporations and other persons in this regard. Accordingly the requirement of the Act that a waiver be filed before the hearing on the application for discharge is omitted.

Rule 406. Implied Waiver of Discharge

If the bankrupt fails to attend and submit himself to examination at the first meeting of creditors, at any meeting specially called for his examination, or at the trial on a complaint objecting to his discharge, the court on motion shall, or on its own initiative may, set a time for hearing to determine whether the bankrupt shall be deemed to have waived his right to a discharge. Notice of the hearing shall be given the bankrupt and such other parties in interest as the court may designate.

ADVISORY COMMITTEE'S NOTE

This rule provides a procedure for determining whether a bankrupt has waived his right to a discharge under § 14e of the Act. It recognizes the right of the bankrupt to notice and an opportunity to be heard on the question whether his failure to attend and submit to an examination was excusable. Notwithstanding the omission in § 14e of any recognition of the possibility of excusing failure to appear or be examined at the hearing on objections to discharge, the courts have afforded the bankrupt an opportunity to justify a failure to appear or submit to examination at such a hearing as well as at a meeting of creditors. See *LaBarbera v. Grubard*, 112 F.2d 738 (2d Cir. 1940); *In re Burdick*, 62 F.Supp. 931 (W.D.N.Y. 1945); 1 Collier 1314.11 (1966). Notwithstanding the failure of the bankrupt to appear or be examined at a meeting or at the trial of the complaint objecting to his discharge, the court may proceed to determine whether the discharge should be denied on a ground specified in § 14c of the Act. If the plaintiff discharges his burden of proof at the trial, he is entitled to judgment denying the discharge, and the issues determinable at a hearing under this rule would thereby become moot.

Rule 407. Burden of Proof in Objecting to Discharge

At the trial on a complaint objecting to a discharge, the plaintiff has the burden of proving the facts essential to his objection.

ADVISORY COMMITTEE'S NOTE

This rule is an adaptation of Cal.Evid. Code § 500, which sets out the basic rule governing burden of proof in civil litigation. The rule supersedes the proviso at the end of § 14c of the Act. The proviso has generally been equated with a requirement that the objector make a prima facie case under § 14c. See, *e.g., In re Pioch*, 235 F.2d 903, 905 (3d Cir. 1956) ("the burden of proof is on the objecting creditor to prevent the bankrupt's discharge, otherwise stated, the objecting creditor must make out a prima facie case"). See also *Feldenstein v. Radio Distributing Co.*, 323 F.2d 892, 893 (6th Cir. 1963); *Johnson v. Bockman*, 282 F.2d 541, 545 (10th Cir. 1960); *Industrial Bank of Commerce v. Bissell*, 219 F.2d 621, 625–26 (2d Cir. 1955); *Dizzell v. Scott & Co., Ltd.*, 115 F.2d 873, 875 (1st Cir. 1940); 1 Collier 1311.1 (1966).

This rule does not deal with the burden of going forward with the evidence. Subject to the allocation by the rule of the initial burden of producing evidence and the ultimate burden of persuasion, the rule leaves to the courts the formulation of rules governing the shift of the burden of going forward with the evidence in the light of such considerations as the difficulties of proving the nonexistence of a fact and of establishing a fact as to which the evidence is likely to be more accessible to the bankrupt than to the objector. See, *e.g., In re Haggerty*, 165 F.2d 977, 979–80 (2d Cir. 1948); *Federal Provision Co. v. Ershowsky*, 91 F.2d 574, 575 (2d Cir. 1933); *In re Ricciuto*, 41 F.Supp. 926, 927–28 (E.D.N.Y. 1941).

Rule 408. Notice of Nondischarge

If a waiver of discharge is filed, or if an order is entered denying or revoking a discharge or deeming the right thereto to have been waived, the court shall, within 30 days after the filing of the waiver or the entry of the order, give notice thereof ~~by mail~~ to all creditors ~~and the district director of internal revenue~~ in the manner provided in Rule 203.

Advisory Committee's Note

The suspension by § 11f of the Act of the statute of limitations affecting any provable debt of a bankrupt terminates within 30 days after the bankrupt is denied his discharge or otherwise loses his right to a discharge. If, however, a bankrupt's failure to get a discharge does not come to the attention of his creditors until after the statutes of limitations have run, he obtains substantially the same benefits from his bankruptcy as the bankrupt who is discharged.

This new rule requires the court to notify creditors ~~and the district director of internal revenue~~ if a bankrupt fails to obtain a discharge because he filed a waiver of discharge under Rule 405, or because he lost his right thereto by virtue of an order denying or revoking his discharge under § 14c or § 15 of the Act or determining that he had waived his right to a discharge under Rule 406.

Rule 409. Determination of Dischargeability of a Debt; Judgment on Nondischargeable Debt; Jury Trial

(a) Proceeding to Determine Dischargeability.

(1) Persons Entitled to File Complaint; Time for Filing in Ordinary Cases. A bank-

rupt or any creditor may file a complaint with the court to obtain a determination of the dischargeability of any debt. Except as provided in paragraph (2) of this subdivision, the complaint may be filed at any time, and a case may be reopened without the payment of an additional filing fee for the purpose of filing a complaint under this rule.

(2) *Time for Filing Complaint Under § 17c(2) of the Act; Notice of Time Fixed.* The court shall make an order fixing a time for the filing of a complaint to determine the dischargeability of any debt pursuant to § 17c(2) of the Act. The time shall be not less than 30 days nor more than 90 days after the first date set for the first meeting of creditors, except that if notice of no dividend is given pursuant to Rule 203(b), the court may fix such time as early as the first date set for the first meeting of creditors. The court shall give creditors at least 30 days' notice of the ~~order~~ time so fixed except that only 10 days' notice is required if notice of no dividend is given under Rule 203(b). Such notice shall be given to all creditors ~~and the district director of internal revenue~~ in the manner provided in Rule 203. The court may for cause, ~~u~~upon its own initiative or ~~u~~upon application of any party in interest, extend the time fixed under this paragraph.

(b) Claim and Demand for Judgment on Nondischargeable Debt. If his claim has not yet been reduced to judgment, the creditor shall include in a complaint or answer filed

under subdivision (a) of this rule a statement of his claim and demand for judgment on the debt as provided in § 17c(3) of the Act.

(c) Jury Trial. Either party may demand a trial by jury of any issue triable of right by a jury by serving ~~up~~on the other party and filing a demand therefor in writing at any time after the filing of a complaint under this rule and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed ~~up~~on a pleading of the party. In his demand the party shall specify the issues which he wishes to be so tried. If he has demanded trial by jury for only some of the issues so triable of right, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other issues so triable of right in the proceeding. The trial of an issue for which a jury trial has been demanded shall be placed on the jury calendar of the district court when it is ready for trial unless (1) the bankruptcy judge determines after hearing on notice that the issue is not triable of right by a jury or (2) a local rule of court provides otherwise. Issues not triable of right by a jury may be tried by the bankruptcy judge, and motions and applications in the proceeding other than those necessarily incidental to and made during the course of the jury trial may be determined by the bankruptcy judge. The failure of a party to serve and file a de-

mand in accordance with this rule constitutes a waiver by him of trial by jury. Rules 47–51 of the Federal Rules of Civil Procedure apply to a jury trial under this subdivision.

(d) *Applicability of Rules in Part VII.* A proceeding commenced by ~~the~~ complaint filed under this rule is governed by the rules in Part VII. a

ADVISORY COMMITTEE'S NOTE

This rule prescribes the procedure to be followed when a party requests the court of bankruptcy to determine dischargeability of a debt pursuant to § 17c of the Act. The provisions authorizing reduction of the time to be allowed for filing a complaint under the rule and of the required interval between the notice and the date fixed by the court are correlated with the provisions of Rules 203(b), 302(e)(4), and 404(a) and (b) that enable the court to expedite the administration of estates in which no dividend is anticipated. Utilization of the expedited procedures authorized by these provisions for the handling of no-asset and nominal asset cases is discretionary, and the time fixed by the court under paragraph (2) may be extended as provided therein and in Rule 906(b).

Although a complaint that comes within § 17c(2) of the Act must ordinarily be filed before the determination of whether the bankrupt will be discharged, the court need not determine the issues presented by the complaint filed under this rule until the question of discharge has been determined under Rule 404. A complaint filed under this rule initiates an adversary proceeding as provided in Rule 703.

Jury Trial. Subdivision (c) preserves the right to jury trial where it exists under nonbankruptcy law and is an adaptation of the provisions of the Federal Rules of Civil Procedure that govern jury trials. Under the fifth sentence of the subdivision a demand for jury trial requires placement of an issue triable of right by the jury

jury trials to be conducted by a district judge,

on the jury calendar of ~~the district court when the issue is ready for trial;~~ but the bankruptcy judge may deny the demand if he determines after notice and hearing that there is no issue triable of right by a jury. The same sentence recognizes, however, that a local rule of court may make different provisions respecting the placement on the jury calendar, *e.g.*, by providing for immediate placement of the issue on the district court's calendar and restricting authority to grant or deny the demand to a judge of that court, or by providing for retention of the entire proceeding by the referee with authority to conduct the jury trial in the bankruptcy court.

PART V. COURTS OF BANKRUPTCY AND OFFICERS AND PERSONNEL; THEIR DUTIES

Rule 501. Courts of Bankruptcy and Referees' Offices

(a) Courts of Bankruptcy Always Open. The courts of bankruptcy shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules.

(b) Trials and Hearings; Orders in Chambers. All meetings of creditors and hearings shall be conducted in open court and so far as convenient in a regular court room. All other acts or proceedings may be done or conducted by a bankruptcy judge in chambers and at any place either within or without the district; but no hearing, other than one *ex parte*, shall be conducted outside the district without the consent of all parties affected thereby.

(c) Referee's Office. The referee's principal office with a clerical assistant in attendance shall be open during business hours on all days except Saturdays, Sundays, and the legal holidays as listed in Rule 6(a) of the Federal Rules of Civil Procedure, but a local rule or order may provide that the referee's office shall be open for specified hours on Saturdays or particular legal holidays other

than those listed in Rule 77(c) of the Federal Rules of Civil Procedure.

ADVISORY COMMITTEE'S NOTE

This rule is adapted from subdivision (a), (b), and (c) of Rule 77 of the Federal Rules of Civil Procedure.

Insofar as the acts the clerk is authorized to perform by the last sentence of Civil Rule 77(c) are ministerial, the referee may delegate their performance in bankruptcy cases to an assistant in his office pursuant to Rule 506. Rule 77(d) of the Federal Rules of Civil Procedure, dealing with notice of orders or judgments, is adapted in Rule 922.

As pointed out in the Note accompanying Rule 204, the regular places at which courts shall be held within each district and at which creditors' meetings may be held are determined by the Judicial Conference of the United States pursuant to § 37b(1) of the Act. The referee's principal office is his regular place of office designated by the Conference under this statutory provision.

Rule 502. ~~Abolition of~~ Referees' Bonds

Not Required

A referee shall not be required to file a bond in order to qualify.

ADVISORY COMMITTEE'S NOTE

~~The requirement of § 50a of the Act that a referee qualify by entering into a bond is a vestige of the fee system of compensating referees that prevailed before the enactment of the Referees' Salary Act of 1946, 60 Stat. 326, when a referee was frequently the custodian of money of estates. Since a referee ordinarily no longer holds funds in his official capacity, there is no more justification for requiring him to file a bond than there is for any other judicial officer.~~

This rule conforms to Public Law 92-310, enacted June 6, 1972, which repealed the provisions of § 50 of the Act that refer to referees' bonds.

Rule 503. Restrictions on Referees

A referee shall not ~~purchase~~, directly or

engage in any transaction,

indirectly, ~~any property of an~~ estate and with the shall not act as trustee or receiver in any case under the Act. An active full-time referee shall not engage in the practice of law, and an active part-time referee shall not act as attorney for any party in any case under the Act.

ADVISORY COMMITTEE'S NOTE

This rule is derived from § 39b of the Act. The rule does not include the restriction of § 39b on the activities of retired referees, since this is a matter which should be correlated to the benefits provided such referees by Congress. The disqualification required by clause (1) of § 39b is incorporated into Rule 505(b).

Rule 504. Books, Records, and Reports of Referees

(a) Records to be Kept; Reports to be Made. The referee shall keep a docket for each case referred to him and shall keep a list of claims filed against the estate in each case in which it appears there will be a distribution to unsecured creditors after payment of the costs and expenses of administration. He shall keep such other books and records and make such reports as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States. All papers filed with the referee, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the referee's docket. These en-

tries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process.

(b) Disposition of Papers of Closed Cases. When a case is closed, the referee shall transmit all papers pertaining thereto to the clerk of the district court.

ADVISORY COMMITTEE'S NOTE

Subdivision (a). This rule is derived from §§ 39a(9) and 42 of the Act, General Orders 1 (second paragraph), 24, and 26, and Rule 79(a) of the Federal Rules of Civil Procedure. A list of claims is required to be kept only in asset cases, *i.e.*, when a distribution to unsecured creditors other than administrative expense claimants is anticipated. The list serves no purpose except in such cases, and the referee should be relieved of the unnecessary burden in the large number of no-asset and nominal asset cases. The public character of the docket and list kept by the referee is provided for by Rule 508. Authority to prescribe other books and records to be kept and the reports to be made by referees is vested in the Director of the Administrative Office subject to the approval of the Judicial Conference. The authority so conferred falls within the responsibilities conferred upon the Director and the Judicial Conference by 28 U.S.C. §§ 604 and 605. See also §§ 34, 37, 40, 43, 53, and 62 of the Act. The last two sentences of subdivision (a) are adapted from Rule 79(a) of the Federal Rules of Civil Procedure.

The admissibility in evidence of copies of records kept by referees is governed by § 21d, e, and f of the Act and by the Federal Rules of Evidence, made applicable to cases and proceedings in bankruptcy by Rule 917.

Subdivision (b). The custody and disposition of papers transmitted to the clerk pursuant to subdivision (b) are governed by 28 U.S.C. § 457.

Rule 505. Nepotism, Influence, and Interest

(a) Appointment or Employment of Relative of or Person Connected with Judge or Referee. No person may be appointed as trustee, receiver, marshal, or appraiser or employed as accountant or auctioneer in a bankruptcy case (1) if he is a relative of any judge or referee of the court making the appointment or authorizing the employment, or (2) if he is so connected with any judge or referee of the court making the appointment or authorizing the employment as to render such appointment or employment improper.

(b) Disqualification of Judge or Referee from Acting in Case: Relationship to Party or Attorney; Interest in Case; Appearance of Influence. Any judge or referee shall disqualify himself in any bankruptcy case (1) in which he is a relative of any party or his attorney, has a substantial, direct or indirect interest, has been of counsel, or is or has been a material witness, or (2) if his acting therein would justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position, or influence of any party or other person.

(c) Disqualification of Judge or Referee from Authorizing Employment of Attorney. Any judge or referee shall disqualify himself from authorizing the employment of (1) a relative as an attorney in a bankruptcy case, or (2) an attorney in a bankruptcy case if the judge or referee is so connected with the

and from determining the compensation

attorney as to render it improper for him to authorize such employment.

ADVISORY COMMITTEE'S NOTE

Restrictions respecting relatives. The restrictions on the appointment and employment of relatives have antecedents in 28 U.S.C. § 458, 18 U.S.C. § 1910, and 11 U.S.C. § 76a. The first of these statutory provisions prohibits the appointment to or employment in "any office or duty in any court" of a relative of any justice or judge of such court. This statute has been subjected to little interpretation, and it is not clear that it extends to such ad hoc and temporary appointments and employments as those listed in subdivision (a) of the rule. The other two statutes are directed only at the appointment of receivers and trustees who are related to judges of United States courts. Subdivision (a)(1) makes explicit as a rule of judicial administration for all bankruptcy cases that relatives of neither the judges nor the referees of any court of bankruptcy shall be appointed to any of the offices or employed in any of the responsibilities listed. The forbidden degree of relationship varies among the three statutes cited above. The more explicit definition of relative in the Act (§ 1(27)), which includes any person related by affinity or consanguinity within the third degree as determined by the common law and includes the spouse, is the reference intended by this rule.

The rule is not intended to restrict creditors in the exercise of their right to elect a trustee pursuant to Rule 209(a). Nor does the rule interdict the choice by the trustee or any other party of an attorney who is a relative of the judge or referee before whom a proceeding under the Act is pending. The judge or referee is, however, required to disqualify himself from authorizing employment of a relative as an attorney under the Act and must disqualify himself from acting in any proceeding in which a relative is an attorney or a party.

Improper connections. The provisions in subdivisions (a)(2) and (c)(2) are adaptations of the "improper connec-

tion" clause of 28 U.S.C § 455. The first of these provisions goes beyond the statute in prohibiting the appointment or employment of a person to an office or duty listed therein if he has the described connection with any judge or referee of the court authorizing the appointment or employment.

Interest or appearance of influence. Subdivision (b)(1) combines provisions in § 39b(1) of the Act and the first half of 28 U.S.C. § 455 and subjects a judge and referee to essentially the same obligation to disqualify himself on account of interest or personal involvement in a case. *Cf. Dubnoff v. Goldstein,* 385 F.2d 717, 720–21 (2d Cir. 1967). Subdivision (b)(2) is adapted from Canon 13 of the Canons of Judicial Ethics of the American Bar Association.

Rule 506. Delegation of Ministerial Functions

The referee may delegate any ministerial function to an assistant employed in his office or, with the approval of the chief judge of the district court, to any person employed in the office of the clerk of the district court.

Advisory Committee's Note

This rule enables the referee to delegate any function he is required or authorized by the Act or by these rules to perform to an assistant in his office or to an employee in the office of the clerk of the district court, unless the function is a judicial one. The referee's authority to delegate applies whether the duty is imposed or the authority is conferred on him when acting as "the court," as "the bankruptcy judge," or as "the referee." The "court" includes the referee, as provided in § 1(9) of the Act, and "bankruptcy judge" includes the referee, as provided in Rule 901(7).

Except in offices where there has been a consolidation of the offices of the clerk of the district court and of the

referee, the delegation authorized by this rule will ordinarily be made to an employee in the referee's office. When a district judge is acting as a bankruptcy judge, he may delegate any duty or authority to perform ministerial acts under these rules to the clerk of the district court and his deputies and assistants as provided in 28 U.S.C. § 956.

Rule 507. Books and Records Kept by Clerks

(a) Bankruptcy Docket. The clerk of the district court shall keep a book known as the "bankruptcy docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States and shall enter therein each bankruptcy case.

(b) Transmission of Papers. The clerk shall transmit to the referee all papers which pertain to every case referred to him, unless the judge otherwise directs.

(c) Index of Cases; Certificate of Search. The clerk shall keep an index of all cases under the Act filed in or transferred to the court and of all discharges granted by the court. On request, the clerk shall make a search of the index and papers in his custody and issue a certificate as to whether a case has been filed in or transferred to the court or a discharge entered in its records.

(d) Public Access. The docket and index kept by the clerk under this rule shall be open to examination by any person without charge.

(e) Other Books and Records of the Clerk.

The clerk shall also keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.

ADVISORY COMMITTEE'S NOTE

This rule supersedes §§ 51(4) and 71 of the Act and the first paragraph of General Order 1. Subdivision (a) is an adaptation of the first sentence of Rule 79(a) of the Federal Rules of Civil Procedure. Subdivision (b), together with Rule 504(b), is a restatement of the duty of the clerk imposed by § 51(4) of the Act. Subdivision (c) provides for the index of cases and discharges as heretofore required by § 71 of the Act. The provision in § 71 of the Act for a fee to the clerk for issuing a certificate of search is now superseded by 28 U.S.C. § 1914(b). The provisions for public access to the clerk's docket in General Order 1 and to the index of cases in § 71 of the Act are merged in subdivision (d) of this rule. Subdivision (e) is an adaptation of Rule 79(d) of the Federal Rules of Civil Procedure.

Rule 508. Public Access to Records and Papers in Bankruptcy Cases

Subject to the provisions of Rule 918, all papers filed in a bankruptcy case, the referee's docket, and the list of claims, if any, are public records and shall be open to examination by any person at reasonable times without charge.

ADVISORY COMMITTEE'S NOTE

The provisions of this rule regarding the referee's docket and list of claims are derived from General Or-

ders 1 and 24. A list of claims is required by Rule 501(a) to be kept only in asset cases. This rule also covers the subject matter of § 49 of the Act (Accounts and Papers of Receivers and Trustees). The recognition of the right of public access to papers filed in a bankruptcy case accords with the rule of the common law that court records are public documents open to inspection, subject to reasonable regulation. 20 Am. Jur. (2d), Courts § 61 (1965); Anno., 175 A.L.R. 1260 (1948). Rule 918 authorizes the court in particular circumstances to enter protective orders respecting secret, confidential, scandalous, or defamatory matter contained in any paper filed in a bankruptcy case. Referees are relieved by these rules of the duty imposed on them by § 39a(4) of the Act to "furnish or cause to be furnished such information concerning proceedings before them as may be requested by parties in interest." The right of such parties to information in the public records of the court is sufficiently assured by this rule, by Rule 218(3), and by 18 U.S.C. § 151, which imposes criminal sanctions for refusal of a "reasonable opportunity" to a party in interest to inspect "documents and accounts relating to the affairs of estates in his charge."

See also the second paragraph of the Note accompanying Rule 218 supra.

Rule 509. Filing of Papers

commencing a bankruptcy case

(a) *Place of Filing.* A petition shall be filed with the clerk of the district court. After reference, all papers, including proofs of claim, shall be filed with the referee unless otherwise directed by local rule or by order of the judge.

a petition filed in a pending case and

(b) *Notation of Time of Filing.* The clerk of the district court shall note on the petition the date and hour of its filing, and the clerk or the referee shall note the date of its filing on each paper thereafter filed with him.

(c) *Error in Filing.* A paper erroneously delivered to ~~either~~ the district judge, referee,

intended to be filed but

trustee or receiver, or the attorney for either of them, or to the

clerk of the district court, ~~trustee, receiver, or debtor in possession~~ shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the proper person ~~and~~ shall be deemed filed ~~with him~~ as of the date of its original delivery.

or

. In the interest of justice, the court may order that the paper

ADVISORY COMMITTEE'S NOTE

Subdivision (a) is an adaptation of General Order 20. There will be few cases where papers subsequent to the petition should not be filed with the referee. Subdivision (a) recognizes, however, that considerations of administrative convenience may dictate a variation from the normal filing practice prescribed by the rule. In particular the second sentence of this subdivision, by allowing a different provision by local rule, accommodates those offices in which consolidation of personnel and facilities of the clerk of the district court and the referee or the physical locations of the clerk's and referee's offices make it desirable to require all papers, including proofs of claim, to be filed with the clerk of the district court who acts for the referee in receiving any papers filed in the proceeding after a reference.

Subdivision (b) is derived from General Order 2.

Subdivision (c). By subdivision (c) ~~delivery of a paper to the wrong person is excused and made the equivalent of a proper filing when the recipient is one of the persons named therein. The recipient in such case is~~ charged with the duty of transmitting the paper to the proper person. This subdivision is new, but it is an extension of the rule of practice prescribed in the last sentence of General Order 21(1) respecting proofs of claim delivered to the trustee.

where a paper to be filed is misdelivered to one of a number of persons connected with a bankruptcy case or the bankruptcy court, the recipient is

If not contrary to the interest of justice the erroneous delivery may be deemed by the court to be the equivalent of a proper filing.

See 3 Collier ¶ 57.10 (1961).

Rule 510. Issuance and Certification of Copies of Papers

On request, the referee or the clerk of the district court shall issue a certified copy of

the record of any proceeding in a bankruptcy case or of any paper filed with the court.

ADVISORY COMMITTEE'S NOTE

Subdivisions d, e, and f of § 21 of the Act declare the evidentiary effect to be given certified copies of certain orders entered in a bankruptcy case, of proceedings before a referee, and of "papers." Section 21d refers to "certified copies" "issued by the clerk, referee, or an employee of the referee designated by his order, which shall be filed in the office of the clerk." This rule makes explicit the duty of the referee or the clerk to issue a certified copy of the record of any proceeding in a bankruptcy or any paper filed with the court. The issuance of such a certified copy is a ministerial duty of the kind delegable by the referee to an assistant under Rule 506, but the admissibility and evidentiary effect of the copy are to be governed by the Federal Rules of Evidence so far as federal courts are concerned and by subdivisions d, e, and f of § 21 so far as state courts are concerned. Rule ~~910~~ 917 makes the Federal Rules of Evidence applicable ~~to cases and proceedings~~ in bankruptcy cases. Rule 1005 of the Federal Rules of Evidence allows the contents of an official record or of a paper filed with the court to be proved by a duly certified copy, and a copy certified and issued in accordance with this Bankruptcy Rule 510 is accorded authenticity for this purpose by Rule 902(4) of the Federal Rules of Evidence.

Ordinarily only the officer having custody of the original record or paper when the request is made would be in a position to issue a certificate under this rule. See 2 Collier ¶ 21.27 (1964).

Rule 511. Recording and Reporting of Proceedings

(a) *Record of Proceedings.* Whenever practicable, the court shall require a record

to be made of all proceedings in bankruptcy cases. The record may be taken by ~~electronic~~ sound recording or by a reporter employed on authorization of the court to take a verbatim record by shorthand or other means. The expense of making the record shall be a charge against the estate unless the court assesses the cost or a part thereof against a person who asserts a vexatious or frivolous claim or defense. The reporter or operator of a recording device shall attach his certificate to the original shorthand notes or other original records taken under this rule and promptly file them with the court for retention for at least 6 months and as long thereafter as the court directs.

(b) Transcripts of Proceedings. Upon the request of any person, including the United States, who has agreed to pay the fee therefor, or of the bankruptcy judge, the reporter or a typist shall promptly transcribe the original records of the requested parts of a proceeding and deliver the transcript, certified by him, to the person making the request. A certified copy of any transcript so made shall be promptly filed with the court by the person making the transcript. The fees for transcripts shall be charged at rates prescribed by the court but in no event shall a separate fee be charged for the copy filed with the court pursuant to the preceding sentence. The cost of transcription shall be a charge against the estate only when approved by the court.

(c) Admissibility of Record in Evidence.

When properly certified, ~~an electronic~~ sound recording or a transcript of a proceeding shall be admissible evidence to establish the record thereof and shall be deemed prima facie a correct statement of the testimony taken and the proceedings had.

ADVISORY COMMITTEE'S NOTE

Subdivision (a) of this rule declares and implements as a requisite of sound bankruptcy administration that all proceedings in bankruptcy cases shall be recorded verbatim. Ordinarily it will be possible for the record to be taken by an electronic sound device, but a stenographer may be employed as reporter, as heretofore authorized by § 38(7) of the Act, for the purpose of taking a record in shorthand, by stenotypy, or other means. The court should not allow an examination, hearing, or other proceeding in a bankruptcy case to continue without recording unless neither a stenographer nor an operable recording device is available and neither can be obtained without undue delay. The second sentence of subdivision (a) modifies the rule of General Order 10 in authorizing relief of the estate from liability for the cost of recording proceedings which result from the assertion of vexatious or frivolous claims. The third sentence of the subdivision incorporates a requirement comparable to that imposed by 28 U.S.C. § 753(b) on official court reporters.

Subdivision (b) is an adaptation of provisions in 28 U.S.C. § 753(b) and (f). The person who prepares the transcript as provided in this subdivision need not have taken down the original record by shorthand or other means but may be a typist who prepares the transcript from ~~an electronic~~ sound recording. Variances in prevailing rates of charges for stenographic services and other circumstances having a legitimate bearing on charges made in bankruptcy cases may be reflected in the rates prescribed by the court under this subdivision. The last sentence of this subdivision emphasizes the differentiation that must be made between the expense of the re-

a

or other

a

There is no requirement that the typist be an employee of the bankruptcy court.

cording by device or shorthand and the cost of the transcription for the purpose of allocating the charges under this rule. When the bankruptcy judge requires a transcript that is not an additional copy requested by someone who has paid the fee for the original, the cost of such transcript would be properly charged to the estate.

Subdivision (c) is an adaptation of provisions found in § 21d of the Act, 28 U.S.C. § 753(b), and Rule 80(c) of the Federal Rules of Civil Procedure. When the record of a proceeding in a bankruptcy case is admissible in evidence in a later proceeding, a properly certified sound recording is not objectionable because of the mode or form of the recording. It is of course necessary to insure "the accuracy and identity of the record," which includes sufficient intelligibility to meet minimal standards of reliability. "If these requirements of reliability are met, the nature of the record as well as the mode of its preparation should be immaterial." *Tatum v. United States*, 249 F.2d 129, 131 (D.C. Cir. 1957), cert. denied, 356 U.S. 943 (1958). Subdivision (c) is consonant with the provisions of the Federal Rules of Evidence and supplements them by according prima facie effect to a properly certified recording or transcript as a correct statement of the testimony and proceedings.

Rule 512. Designated Depositories

(a) Designation. The referees ~~in each district~~ shall designate ~~the~~ order banking institutions as depositories for the money of estates. Each depository so designated shall give security in accordance with subdivision (b) of this rule for the prompt repayment of deposits made therein. The referees may from time to time change the number of depositories, the designations, or the amount of security required. Except as provided in the last sentence of subdivision (b), the author-

by

ity of referees under this rule shall be exercised by a majority vote.

(b) Security Required. Except as provided hereinafter, the referees shall require from each designated depository a bond secured by the undertaking of an authorized corporate surety approved by them, or by the deposit of securities designated in Title 6, U.S.C., § 15. Securities accepted for deposit in lieu of a surety upon a depository bond shall be deposited by the depository bank in the custody of a Federal Reserve bank or branch thereof designated by the referees and shall be subject to the order of the referees. No bond or other security shall be required for any deposits fully insured under Title 12, U.S.C., § 1821, and any referee may designate a banking institution for the purpose of receiving deposits so insured.

(c) Prohibition of Deposits When Adequacy of Security Doubtful. No receiver or trustee or other person shall deposit in any depository money received or held by him as a fiduciary under the Act if he has reasonable cause to believe that the bond or the security therefor is or may be inadequate in view of existing and expected deposits.

(d) Condition of Bond; Place of Filing; Proceeding on Bond. The condition of a bond given under this rule shall be that the designated banking institution will well and truly account for all money deposited with it as depository and for all interest payable on savings and time deposits when duly authorized, will pay out such money and interest

only in accordance with the Act, these rules, and rules and orders of the court, and will otherwise faithfully perform all its duties as depository. A bond given under this rule shall be filed with the court and may be proceeded upon in the name of the United States for the use of any person injured by a breach of the condition.

(e) New Bond: When Required. The referees shall require a depository to give a new bond whenever the prior bond, together with securities deposited pursuant to subdivision (b), does not appear to constitute adequate security in view of existing and expected deposits.

(f) Revocation of Designation. If any depository fails, within the time fixed, to give a bond under this rule or to deposit securities adequate for existing and expected deposits, the referees shall order the depository immediately to pay over all money on deposit with it, with all interest payable thereon, and shall revoke its designation.

(g) Relief from Liability on Bond. A surety on the bond of a depository may, by an application setting forth the grounds therefor, request to be relieved from liability with respect to any subsequent default of the depository. If, after hearing upon notice to the depository, other sureties, trustees, and other representatives of estates having money in the depository, the referees determine that the application can be granted without injury to any party in interest, the applicant shall be relieved and a new bond or

other appropriate security shall be required.

(h) Reports Required of Designated Depositories. The Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States shall prescribe by regulation the reports to be made by designated depositories.

ADVISORY COMMITTEE'S NOTE

This rule is based on § 61 of the Bankruptcy Act and General Order 53. It vests the authority to designate and terminate designations of depositories in the referees rather than the judges in recognition of the fact that the referees are more likely to be familiar with the considerations that ought to govern the exercise of such authority. A bond given pursuant to the rule should accordingly be filed with the court rather than with the clerk of the court as provided in § 50h of the Act. *Cf.* Rule 509(a). The last sentence of subdivision (b) permits any referee to designate a depository for receiving funds to the extent they are insured by the Federal Deposit Insurance Fund. Any other designation shall be made by the referees of the district acting concurrently. Since the rule recognizes only corporate sureties, references in General Order 53 to qualifications of individual sureties and to deceased sureties are omitted from this rule. For the same reason the 5-year limitation imposed by General Order 53(7) on the term of a depository bond is deleted, this matter being left for prescription by the referees. The rule omits the provisions in General Order 53(9) for termination of a surety's liability on a bond when a new bond is approved, since the term of the obligation should be determined by reference to its language and the order approving the bond. The responsibility for prescribing reporting requirements for designated depositories is assigned to the Director of the Administrative Office subject to the approval of the Judicial Conference to permit flexibility and the prompt utilization of new procedures

The subdivision contemplates that the designation of depositories in any territory shall be made by the referee designated by the Judicial Conference pursuant to § 37 of the Act to serve that territory.

and technological improvements as they are developed. The provision in subdivision (d) regarding a proceeding on a bond given under this rule is derived from § 50h of the Act. *Cf.* Rule 717. Such a proceeding is governed by the rules in Part VII. See the Note accompanying Rule 701. See also Rule 925.

Rule 513. Special Masters

If a reference is made in a bankruptcy case by a judge to a special master, the Federal Rules of Civil Procedure applicable to masters apply.

ADVISORY COMMITTEE'S NOTE

The Federal Rules of Civil Procedure applicable to masters include the third sentence of Rule 52(a) and Rule 53. Although references to special masters may be made pursuant to the Federal Rules of Civil Procedure, "A reference to a master shall be the exception and not the rule." Fed.R.Civ.P. 53(b); 5 Moore ¶¶ 53.02, 53.12[6] (1969). This rule does not contemplate that a referee shall ever have occasion to refer any matter to a special master.

Rule 514. Closing Cases

Whenever it appears that an estate has been administered and the court has passed upon the final account and discharged the trustee, the case shall be closed.

ADVISORY COMMITTEE'S NOTE

This rule is adapted from § 2a(8) of the Act. Dismissal of a case for want of prosecution or failure to pay filing fees is governed by Rule 120. An estate may be closed even though the period allowed by Rule 302(e) for filing claims has not expired. 1 Collier ¶ 2.48 (1968). The clos-

ing of a case may be expedited when a notice of no dividends is given under Rule 203(b), when no final meeting is necessary under Rule 204(c), and when no trustee has been elected or appointed under Rule 211.

Rule 515. Reopening Cases

A case may be reopened on application by the bankrupt or other person to administer assets, to accord relief to the bankrupt, or for other good cause. The application shall be filed with the clerk of the district court having custody of the papers in the case. The case shall be referred forthwith for action on the application and for further proceedings therein.

Advisory Committee's Note

This rule is an elaboration of the provision of § 2a(8) of the Act authorizing estates to be reopened for cause shown. Although this provision was amended in 1938 to clarify the authority of the court to reopen for purposes other than the administration of newly discovered assets, see 1 Collier ¶ 2.49 (1968), the courts have been reluctant to sustain exercises of this authority for the benefit of the bankrupt. See, *e.g.*, *Saper v. Viviani*, 226 F.2d 608, 610–11 (2d Cir. 1955), rev'g sub nom. *In re John Viviane & Son*, 132 F.Supp. 633 (S.D.N.Y. 1955); *In re Perlman*, 116 F.2d 49 (2d Cir. 1940) (Clark, C.J., dissenting), rev'g 34 F.Supp. 685 (S.D.N.Y. 1940); *In re Barlean*, 279 F.Supp. 260 (D.Mont. 1968). The grant of an application to reopen under this rule remains a matter of discretion of the court, but relief to the bankrupt is explicitly recognized as a proper cause for the reopening. A principal ground for refusing to reopen a case to enable a bankrupt to get a discharge has been the rule that the closing of an estate without the grant of a discharge is the legal equivalent of a denial of discharge. *Perlman v. 322 West Seventy-Second Street Co., Inc.*, 127 F.2d 716,

718–19 (2d Cir. 1942); *In re Butts*, 123 F.2d 250, 251 (2d Cir. 1941). This rule has been substantially qualified by § 17b of the Act, added by Pub.Law 91-167 and Rule 120(c). See the Note accompanying the latter rule.

An application under this rule is not subject to the one-year limitation of Rule 60(b) of the Federal Rules of Civil Procedure, which generally applies to motions for relief from an order of the court. See Rule 924. The provision for automatic reference is new. *Cf. In re Loewer-ree*, 157 F.2d 831, 831 (2d Cir. 1946). It is consonant with the policy of the rules to eliminate unnecessary paperwork and involvement of the judge in bankruptcy cases otherwise than as provided in Rule 102. *Cf.* Rule 217(b). The fees, if any, to be charged for reopening cases are prescribed by the Judicial Conference pursuant to § 40c of the Act.

district

SEE ATTACHMENT

INSERT IN NOTE AT END OF RULE 515

A number of rules authorize the court to take action respecting matters connected with a closed case without the necessity of a reopening. See, e.g., Rule 403(e), authorizing entry of order approving exemptions after a case is closed when no objections were filed to the trustee's report; Rule 608, authorizing abandonment of property of inconsequential value recovered after a case is closed and entry of a post-closing order approving abandonment of scheduled but unadministered property; Rule 924, incorporating in these rules Rule 60(a) of the Federal Rules of Civil Procedure, which enables the court on its own initiative to correct clerical mistakes in judgments, orders, and other parts of the records and errors therein due to oversight or omission. A judgment determined to be nondischargeable pursuant to Rule 409 may be enforced after a case is closed by a writ of execution obtained pursuant to Rule 769 or Rule 69 of the Federal Rules of Civil Procedure.

PART VI. COLLECTION AND LIQUIDATION OF THE ESTATE

Rule 601. Filing of Petition as Automatic Stay Against Lien Enforcement

(a) Stay Against Lien Enforcement. The filing of a petition shall operate as a stay of any act or the commencement or continuation of any court proceeding ~~or act~~ to enforce (1) a lien against property in the custody of the bankruptcy court, or (2) a lien against the property of the bankrupt obtained within 4 months before bankruptcy by attachment, judgment, levy, or other legal or equitable process or proceedings.

(b) Duration of Stay. Except as it may be terminated, annulled, or modified by the bankruptcy court under subdivision (c), (d), or (e) of this rule, the stay shall continue until the bankruptcy case is dismissed or closed, or until the property subject to the lien is, with the approval of the ~~bankruptcy~~ court, set apart as exempt, abandoned, or transferred.

(c) Relief from Stay. Upon the filing of a complaint seeking relief from a stay provided by this rule, the bankruptcy ~~judge~~ court shall, subject to the provisions of subdivision (d) of this rule, set the trial ~~date~~ date for the earliest possible ~~time~~, and it shall take precedence ~~of~~ over all matters except older matters of the same character. ~~Unless the party seeking continuation of the stay shows that he is entitled thereto, the~~ The court ~~shall~~ may, for cause shown, terminate